NO. 46987-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

JAKE JOSEPH MUSGA
v.

STATE OF WASHINGTON

Appeal from the Superior Court of Pierce County
The Honorable Edmund Murphy, Cause No. 13-1-01369-1

APPELLANT'S SUPPLEMENTAL BRIEF

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A. STATEMENT OF THE CASE

This court remanded this matter to the Pierce County Superior Court for a reference hearing regarding on issues raised in the personal petition filed by JAKE JOSEPH MUSGA, hereinafter petitioner. Appendix A.

This court directed the trial court enter findings of fact necessary to address the following issues:

1. Whether defense counsels' representation was deficient, whether the deficient representation in one or more of the ways petitioner alleges with regard to guilty pleas, and/or his sentencing.

2. Whether defense counsels' representation was deficient, whether the deficient representation prejudiced petitioner with regard to his decision to plead guilty and/or his sentencing. *Id.*

Those allegations of ineffective assistance of counsel are that petitioner's trial counsel Richard Warner (WSBA No. 21399) and Keith Hall (WSBA# 35802) prejudicially failed to:

1. Conduct an investigation into his case and the State's evidence against him;

2. Adequately advise regarding pleading guilty to first degree murder;

3. Inform him of the consequences of his plea and the facts admitted in his guilty plea on the trial court's ability to impose an exceptional sentence. *Id.*

Petitioner argues herein that trial court's findings of fact are not supported by substantial evidence. Petitioner submits that this court will concur that he has demonstrated by a preponderance that he was substantially prejudiced by trial counsel's ineffective representation and that there is a reasonable probability that but for trial counsel's deficient investigation and misadvisement at time of plea, he would not have entered guilty pleas in this case. The evidence adduced at the reference hearing sustains the argument made in this personal restraint petition, prove prejudice and entitle petitioner to the relief requested.

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Petitioner's witnesses included his attorneys Richard Warner and Keith Hall testified at the reference hearing as to primary witness, Todd Maybrown, an experienced criminal defense attorney, and expert on the subject of ineffective of assistance of counsel, who testified as an expert in ineffective assistance of counsel. Petitioner testified, as did the deputy prosecutors and others.

Richard Warner, co-counsel for Musga, has been a member of the Washington State Bar since 1992, RP 198. His practice compromises 90% criminal cases and the remainder are arbitrations for FINRA, a financial industry regulation authority and pro tem work. RP 198-199. Approximately 75% of his practice is contract public defense work. RP 200.

Prior to this case, he estimated that he had handled half a dozen murder cases. RP 200. This was the first case he had taken where the decedent was a young child. RP 201.

He "thinks" he would have taken notes throughout his casework but could not produce them and they were not in his file. RP 507-508. During the progress of the personal restraint petition discovery, Warner provided nine pages of notes asserting that he found them belatedly in another client's file. RP 507. There were no notes memorializing what discovery had been

reviewed with petitioner, who reviewed it with him, what subjects had been discussed, what subjects had been discussed when counsel gave advice regarding the guilty plea. *Id.*.

The defense, with a single exception, did no investigation in April, May, June, July, and most of August. RP 218. Defense did file routine pleadings, make discovery requests, review limited discovery with petitioner, and contact a medical expert. The trial date was November 18, 2009. RP 772.

Warner agreed that petitioner would have been the primary source of information in the case and would have been able to provide relationships between the names in the police reports. RP 206. As such, Warner agreed that he would have wanted to meet frequently with petitioner. RP 207.

Between April 3, 2009 and November 18, 2009(sentencing), counsel met with petitioner for approximately 30 hours. Appendix C – Exhibit 71.

Defense met with petitioner about discovery, but Warner clarified that petitioner did not have the opportunity to look at each page of discovery. RP 700. Warner also noted that petitioner did not ask to look at each page of discovery although Warner asserted that petitioner knew his attorneys had discovery. RP 700. Petitioner would not have known how much discovery his attorneys had. RP 701. Petitioner was not given the opportunity to read the

transcripts of his interview or the interviews of Laura Colley, Rickey Saldavia, Karen Howard. RP 701.

Warner said he discussed police interviews of witnesses but he did not ask petitioner if he wanted to read the interviews, "It is up to him if he wants to read them. I don't recall him asking to read them. I don't recall suggesting he follow along." RP 701.

Warner "believes *we* read him his statement verbatim and Ms. Colley's." RP 701. He did not recall whether Hall was present. RP 702. He did not recall asking petitioner questions about the statements and he did not make notes of his meetings with petitioner. RP 702.

Warner testified that petitioner did not want to look at a couple of graphic, disturbing autopsy photos. RP 401. Defense counsel showed him "some" of the "crime scene" photos. RP 401.

Neither Warner nor Hall was certain about how much discovery in fact had been reviewed with petitioner. RP5-506. Although, he believed he would have made notes when he reviewed the discovery, there were none in the file he provided to counsel for the personal restraint petition. RP 507-508.

Warner agreed that defense could have started witness interviews early in the case. RP 516. Warner believed that the defense could only interview witnesses one time in a criminal case. RP 461.[There is no rule of criminal

practice that so restricts case preparation just as there is no practice rule that limits the law enforcement to a single investigative interview of any witness or the prosecution to a single pretrial interview.]

Prompt interviews of many witnesses was essential to trial preparation in this case. A critical issue concerned whether petitioner had been alone with CC at the time the State believed CC sustained the fatal injuries. Notwithstanding the state's complete lack of any medical opinion regarding the timing of the infliction of the injuries, the state believed the injuries were inflicted between 7:00 pm on March 28, 2009 and 4 am on March 29, 2009.

Defense had a copy of a taped statement she had given to police but never listened to it. RP 442

An independent witness, Karen Howard, informed police the day of CC's death that she had been to the apartment during that time period after hearing adults running and arguing. Warner agreed that it would have been important to talk to witness Karen Howard, in the .36 police report of Det. Nist. RP 205. Howard stated that she had heard "people, adults, running around upstairs." RP 705-707.

He knew that delaying witness interviews may sometimes allow witnesses to get together and confabulate their testimony. RP 847. He also knew this was more likely in families. RP 847.

He knew that the Colley family, the family of CC – the decedent, was close. RP 847. He knew that there was a possibility that they might cover for each other. RP 847. Defense had a taped statement from Laura Colley, CC's mother, but never listened to it. RP 447.

This activity occurred in petitioner's apartment squarely during the time he was alleged to have been alone with CC and during which he was alleged to have inflicted the fatal injuries. Warner knew that petitioner was reportedly alone with CC in the apartment from 6-7 p.m. on Friday night (March 28) until the following morning (March 29th), when CC was pronounced dead. RP 705-708.. Yet Warner had not deemed it essential to prioritize an interview with Howard. RP 710. To the contrary, he planned to defer this interview until, among other things, the investigator had created a "book review" timeline from his discovery review, a phone records review, and an interview with petitioner about it which never occurred. RP 710.

Yet the Howard interview, establishing the presence of other adults – likely both by voice and sight as Howard went to the apartment and spoke to individuals there – inexplicably was not investigated. *Supra.*

Warner acknowledged that there was information in the Laura Colley police interview that established a pattern or practice of prior abuse that should have been investigated. RP 717-718, 719, 722, 723, 727-728. He also viewed her mother Cathy Colley as someone who could have had been involved in CC's fatal injuries and who needed to be interviewed. RP 733-734.

Warner further stated that defense intended to interview in the future Rickey Saldavia, the individual who contacted petitioner in the lobby, to whom petitioner gave his phone to call 911. RP 735, 737. Defense had received a taped statement of the Saldavia interview, but never listed to it. RP 444.

Saldavia made statements critical of petitioner's conduct with CC in the lobby. Yet not only was Saldavia impeached by law enforcement officers, but he was found to have an association with Laura Colley and to have been at the apartment house in the early hours when CC died, visiting a friend in a unit which police had recently conducted a successful drug raid.

Warner was aware that there had been a drug bust in the apartment building shortly before CC's death and that there was some information that police had overlooked some drugs which Laura Colley then took. RP 755. This drug bust took place in the apartment that Rickey Saldavia had visited

immediately before meeting petitioner in the lobby. RP 1466, 1467. . Rickey Saldavia and Laura Colley were social friends on Facebook. This connection between a seller of heroin and a heroin addict, Laura Colley, warranted investigation, particularly when both individuals may well have been in the apartment at the time CC sustained the fatal injuries.

Warner had asked Hall to get police reports related to this but he did not have those police reports. RP 756.

Warner also knew that CC's paternal grandparents and relatives had seen suspicious bruises on him shortly before his death and had not interviewed them prior to the plea, intending to commence interviews in the case after all of the discovery was received. RP 746, 748, 749-750, 754,

Warner acknowledged the conflicting statements of Leah Jensen, Cathy Colley, and Laura Colley regarding the plans for the night of March 28-29th would have required interviews. RP 762-766. There is no legitimate strategic or tactical reason to delay these significant interviews.

Warner would have liked to know that Laura Colley had put CC up for adoption as it potentially suggested that her attachment to him was not as great as she portrayed. RP 211-212. Warner also was not aware of the Child Protective Services [CPS] history with Laura Colley and Cathy Colley. RP 212. Warner should have been familiar enough with the discovery to have

known during the investigation of the case that Laura Colley had put CC up for adoption and that it had caused a big conflict between the Colley family and the family of his biological father. RP 757-758.

Warner was not aware that Laura Colley had made statements that CC could not be taken to the doctor because he would be taken away from them due to his bruising. RP 212. He agreed that this information would have been "worth knowing." RP 213.

Warner knew from viewing photos of CC's body that he had many injuries of different colors which indicate different stages of healing/ages. RP 213. The defense did not seek any experts to assist with assessing the dates/times of inflictions of these bruises. RP 214.

The defense did ask Dr. Cliff Nelson, an associate medical examiner for Multnomah County, Oregon to review the autopsy report and medical reports. RP 214. Nelson was asked to look at the reports to see if the autopsy report was consistent with the medical reports, radiographs, and other treatment materials. Nelson said that there was consistency.

Based on this Dr. Nelson's superficial examination, comporting with the defense order, to determine whether the Pierce County Medical Examiner's opinion was supported by the treatment records, Warner

concluded that the serious anal injury had occurred after Laura Colley left the residence. RP 217. This was an egregious investigative error.

Warner failed to seek any opinion from Dr. Nelson [1] regarding the outer time limits for the injuries, for example, whether the fatal injuries could have been inflicted as long as 18 hours before CC's death. RP 215.

Warner believed that the anal injury had been inflicted after Ms. Coley left and so he did not ask about the outer-limit for the time of possible infliction of this bruise. RP 2116-217. Warner did nothing to question the time parameters of this injury, although there was no medical opinion regarding age of injury. RP 215-216. DR. Nelson's subsequent statements, which the trial court excluded on relevancy grounds, that the injury was inflicted probably closer to the 18 hour time limit was relevant because it vividly establishes the deficiencies of the investigation. Had counsel asked the proper question, of course would have known that the fatal injury didn't occur when the state alleged it did, that is, when the state thought petitioner was alone with CC. Dr. Nelson's opinion of this point was exculpatory for petitioner's and counsel should have been able to use it to inform his client

[1] Petitioner offered Ex. 82, an email from Dr. Clifford Nelson affirming his finding that the anal trauma was inflicted closer to 18 hours prior to CC's death. RP 951-952. The court excluded this exhibit only on relevancy grounds. RP 959.

that the state's medical evidence against him was weak when viewed with all of the other evidence.

Seeking such an opinion would have expanded the number of individuals who had contact with CC during the time that he sustained the fatal injuries.

Warner further clarified that petitioner did not have the opportunity to look at each page of discovery. RP 700. Warner also noted that petitioner did not ask to look at each page of discovery although Warner asserted that petitioner knew his attorneys had discovery. RP 700. Petitioner would not have known how much discovery his attorneys had. RP 701. Petitioner was not given the opportunity to read the transcripts of his interview or the interviews of Laura Colley, Rickey Saldavia, Karen Howard. RP 701. Warner said he discussed the interviews but he did not ask petitioner if he wanted to read the interviews, "It is up to him if he wants to read them. I don't recall him asking to read them. I don't recall suggesting he follow along." RP 701. Warner testified that he would have shown petitioner whatever he wanted to see. RP 401-402

Warner "believes *we* read him his statement verbatim and Ms. Colley's." RP 701. He did not recall whether Hall was present. RP 702.

He did not recall asking petitioner questions about the statements and he did not make notes of his meetings with petitioner. RP 702.

Warner testified that petitioner did not want to look at a couple of graphic, disturbing autopsy photos. RP 401. Defense counsel showed him "some" of the "crime scene" photos. RP 401.

During cross-examination, the deputy prosecutor asked Warner the cryptic question, "Are you aware the Musga family is now attributing that investigation to their own efforts?" [finding Ricky Saldavia on Laura Colley's FaceBook page]. RP 445. Warner had no idea whether the Musgas could access Facebook, the same access to social media as the defense team. RP 508.

Warner also acknowledged that there was information in the Laura Colley interview that established a pattern or practice of prior abuse that should have been investigated. RP 717-718, 719, 722, 723, 727-728. He also viewed her sister Cathy Colley as someone who could have had been involved in CC's fatal injuries and who needed to be interviewed. RP 733-734. Warner further stated that defense intended to interview Rickey Saldavia, the individual who contacted petitioner in the lobby, to whom petitioner gave his phone to call 911. RP 735, 737. Defense made no attempts to interview him.

Warner also knew that CC's paternal grandparents and relatives had seen suspicious bruises on him shortly before his death and had not interviewed them prior to the plea, intending to commence interviews in the case after all of the discovery was received. RP 746, 748, 749-750, 754,

Warner was aware that there had been a drug bust in the apartment building shortly before CC's death and that there some information that police had overlooked some drugs which Laura Colley then took. RP 755. This drug bust took place in the apartment that Rickey Saldavia had visited immediately before meeting petitioner in the lobby. Rickey Saldavia and Laura Colley were social friends on Facebook.

Petitioner had never been in any mental health treatment facility.

Warner was concerned for the DNA report because "it is one of the most important pieces of the case." RP 846.

Warner knew that the trial date was November 18, 2009. RP 772. He knew that the trial date was earlier than defense could prepare for.

Warner could not recall if Hall was present when he went over the plea forms with petitioner. RP 843. Warner thought they could have gone through the plea forms on August 29th or September 6th, although he thought it was more likely to have been September 6th. RP 845.

Warner agreed that sending emails to the prosecutor regarding possible discovery timetables was not investigating. RP 5043-504.

Neither Warner nor Hall was certain about how much discovery in fact had been reviewed with petitioner. RP5-506.

There were no notes memorializing what discovery, if any in fact, was discussed with petitioner and how that discovery was discussed in the context of any recommendation on the decision to plead guilty as charged or risk trial on the amended charge of aggravated murder with a possible sentence of LWOP or death.

The trial counsel made no independent investigation to determine who would have/would have not had access to CC during the window of time when the fatal injuries could have been inflicted RP 863-864.

Warner sometimes gave instructions to David Snyder, an investigator employed at the law office. RP 207-208. In August, 2009, as defense considered the State's demand that petitioner plead guilty as charged or face an amended information charging aggravated murder, he asked Snyder to prepare a timeline of events based on the police reports, not on any independent investigation. RP 208 513; Exhibit 80. Had Snyder ever talked to any witnesses, he would have informed Warner and Hall. RP 208. When Snyder completed the timeline, he did so around the time of the plea (end of

August/early September). Exhibit 56, RP 513. The timeline was a discovery summary and Warner never verified its accuracy or comprehensiveness. RP 514.

Warner asked Snyder to "investigate" criminal histories in the police reports. RP 208. Warner had no idea how he did that. RP 208. Warner knew that the prosecutor provides criminal history in discovery "as a starting point." RP 208.

As for investigators, Warner speculated, "They have other means. I don't know. It is their job. Maybe online, the can go to the counties and look at their websites, that would be my guess." RP 209. Warner did not know whether Snyder provided even a single criminal history in this case. RP 209.

Warner intended to ask Snyder to conduct interviews at some point in the case but he had not so by the time of the entry of the plea on September 9, 2009. RP 210. The defense would have interviewed the Colleys had the matter proceeded to trial. RP 211.

Warner speculated that Snyder might have been trying to track down someone in Tacoma that petitioner had mentioned but he was by no means certain of that. RP 210.

Warner could not recall if Snyder made any written reports. RP 210.

During cross-examination, the State asked Warner whether the following exhibits 1, 2, 9,10-48, 397, 398, 403-405, 409,410, 412-420, 424-426, 428-431, 433, 436- 438, 440, 441, 443, 446, 447, 449-460, 464, 465, 469, 470 "informed" the defense investigation. Warner answered affirmatively but without providing further explication,

> "If there was something that I thought might help Mr. Musga's case or that I specifically wanted my investigator to follow-up on, that would be informed. It could be a police report that I reviewed. It could be a witness statement. It could be a photograph. Something I wanted my investigator to follow up on."

Further, Warner could not recall making any notes about items that informed his investigation or communicating to his investigator what these items were. RP 699. He did not recall if the investigator took any action on any of the items he could not recall having given him or any of the communications he could recall having made to him. RP 699-700.

Warner became aware of the State's alleged informant Herness. RP 772. Warner contended that he and Hall discussed the police report regarding the informant with petitioner "within days after receiving the report because it was so surprising." RP 775. Warner sent an email to Hall on August 14, 2009 telling him that they should see him *next week* to discuss it with him and confront him. RP 778. That email followed an email dated August 13, 2009

instructing "Dave or Angel" [the investigator or legal assistant], run a full criminal history on this snitch ASAP. What is his in . . . need to get the Pierce County Jail housing records to find out if this guy - same pod with Jake when he claims he was. Ask Dave about finishing the timeline saying the offer – 8-30 deadline. Not much of an offer, but the State is threatening – penalty case. The only alternative is LWOP." RP 779-780.

Warner clarified that he wanted to confront petitioner about going against their advice about not talking to anyone except his attorneys about the case. RP 815. He did not recall whether they went through the statement petitioner reportedly made to Herness RP 815.

The defense did not have time to issue the subpoenas between August 13 and the time petitioner entered his plea on September 9, 2009. RP 807.

Although Warner clearly testified that "we" talked to him, he could not remember if Hall was present with him. RP 776. Hall did not go to the jail with Warner prior to August 29, 2009, the day they discussed the plea, above.

Warner testified that he told petitioner that it would not help the cause if a jury thought he had talked to another inmate about the case. RP 467. However, Warner had never interviewed Herness and did not know he had been given a benefit for providing information about petitioner.

Public records in the Pierce County Superior Court LINX system established that in *State v. James Michael Herness*, No. 11-1-01888-3, the State recommended that defendant Herness receive a downward exceptional sentence for the reason that "since his incarceration in the Pierce County Jail, the defendant has provided information on at least four pending cases involving other defendants. In one case, defendant testified for the State. In the fourth case, the defendant gave detectives information relating statements by an inmate who was awaiting trial for murder." Petitioner's Exhibit 76. RP 810. Warner explained that the defense anticipated "going to trial at some point." RP 769. He testified that from April on,

> "We were prepping for trial, prepping for potential mitigation that the State was going to potentially try to turn it into an aggravated case. We were collecting records from various mental health treatment facilities he had been in. Yes. We were collecting information." RP769.

Warner acknowledged receiving a letter from the State containing their "offer" to let petitioner plead guilty as charged to an exceptional sentence or else face an amended charge of aggravated murder which by law carries only two possible sentences, life without parole [LWOP] or death. RP 509; Exhibit 52-A. The attorneys took the letter to the jail to read to petitioner but they did not give him a copy of the letter out of a mistaken belief that they cannot give a piece of paper to a client. RP 509-510.

Defense discussed continuing the case with the prosecutors but Warner could not recall the discussion. RP 220. He remembered that the defense wanted to continue the case into the following year after the holidays so they could get experts and do interviews. RP 220. The defense needed the continuance to prepare the case RP 220-221.

One of the prosecutors had a personal matter near the end of the year, a paternity leave or something similar, and they wanted to resolve the matter before that event. RP 220.

The defense did not note a motion to continue after the State threatened to attempt to or consider changing the case to an aggravated murder case. RP 221. The defense discussed whether it would be better to plead guilty than risk an aggravated. RP 221. The defense did not discuss the amendment with any of the supervising attorneys in the prosecutor's office. RP 221. The prosecutors did not ever in advance of sentencing provide the specific factors they intended to rely upon for the exceptional sentence. RP 235.

Defense counsel did discuss the death penalty with Janet Musga. RP 222.

Warner knew that the State would have difficulty proving the premeditation element of aggravated murder. RP 513. He did not tell this to petitioner. *Passim.*

On August 29, 2009, defense attorneys notified the deputy prosecutors that petitioner would plead guilty. RP 222.

After accepting the offer, they went through the plea form with him. RP 225. Warner could not recall if Hall was present when this happened. RP 225, 264, 269.

Warner "guessed" that petitioner had been given a copy of the information at arraignment although he had not been there and therefore did not know. RP 249. Warner could not recall if he had a copy of the original information with him when he went over the plea forms with petitioner but he contended that "we" went through the information at the first meeting with him in April. RP 228. However, Warner testified that he did not know the prosecutor's purpose in putting the aggravators in the original information. RP 234. At the time the plea paperwork was filled out, defense did not know what the State was going to recommend. RP 230. The defense knew that the State's "recommendation" was "open recommendation – exceptional sentence." RP 230. Warner acknowledged checking paragraphs 6(h)(i),(iii) regarding the

court's authority to impose exceptional sentences. RP 229-230. Warner and Hall never stipulated to an exceptional sentence for petitioner. RP 231. Rather, Warner assumed that petitioner understood because the 19 year old "did not express any hesitation or question about what he was doing." RP 264. Warner knew that petitioner was a 19 year old heroin addict who had dropped out of high school. Whether Warner reviewed the plea paperwork with petitioner on August 29, 2009 or September 6, 2009, he spent less than one hour summarizing two lengthy plea forms to petitioner. Ex 71.

The State never provided notice to the defense of any aggravators it intended to use to support an exceptional sentence. RP 234-235. Warner could not recall whether he advised petitioner that aggravating sentencing factors could be tried to a jury and, if so, whether he wanted a jury trial on them. RP 235. Thus Warner did not believe that the State had complied with the requirements of 4.2(h)(6)(iv) or 4.2(h)(6)(iii) on the statements of plea on guilty in this case. RP 233-234.

The challenged FOF are addressed in turn by issue, with credibility determinations discussed first.

Testimony of Keith Hall.

His testimony was not credible. The trial court's finding that Hall was a credible witness was not supported by substantial evidence. His testimony changed markedly between his first and second appearances on the witness stand. During his first appearance, he was confident about the performance and actions of both counsel. Contrary to Warner's testimony, Hall testified their first meeting [approximately one hour, including time to proceed to and from the attorney visiting room in his until cell once inside the jail] with petitioner on April 5, 2013 [three days post-arraignment] was an introductory meeting to go over discovery and or court document, to provide those to him. RP 566, 592, Appendix C - Exhibit 71.

Warner and petitioner testified that he never had a copy of the information. Like Warner, Hall made no notes in the case. RP 569. It was Hall's understanding that all of the discovery was reviewed with petitioner. RP 570. He then recanted that testimony. RP 601-602. Warner testified to the contrary. Hall testified that if he were the client, he would want to see all discovery. RP 570. Hall's professional opinion was that a defendant should see 100% of the discovery and he explains this to defendants. RP 571. He cannot recall if he explained this to petitioner. RP 571. He recalled that petitioner elected not to look at certain pieces of discovery, including photos

depicting CC after the medical examiner had incised the body. Petitioner did not have his own copy of the discovery. RP 572. After defense began receiving discovery on April 23, 2013, defense met with petitioner for a total of 10 hours, 40 minutes. **Appendix B .** This time was wholly insufficient to review 850+ pages of discovery plus numerous lengthy transcribed statements. Hall had no recollection of seeing the plea paperwork until the plea hearing,

"Certainly I was at the plea so I would have seen it then. I presumably would have seen it before, but I can't remember." RP 642.

He can't remember meeting with petitioner prior to the plea. RP 642-643.

As was Warner's testimony, Hall's testimony defied credence. This was Hall's first murder case, a significant case. He lacks a memory of the most significant events in a criminal case – explaining the charging documents, discussing the facts, reviewing the discovery, particularly any statement by petitioner discussing the facts in the context of the law, discussing the pros and cons of entering a guilty plea, discussing the State's sentencing recommendations and threats to amend if a guilty plea as charged is not entered, carefully reviewing the plea paperwork, and preparing for sentencing especially by assisting the client with allocution. Hall could not recall nearly all of these actions and those he purported to recall, he either

lacked detail of, his memory was contrary to Warner, or he later recanted his earlier testimony. His motive to be less than candid is identical to that of Warner. No criminal attorney wants to found ineffective by the courts. Such a finding has adverse consequences with the WSBA, malpractice carriers, professional reputation, potential clients, etc. The trial court's findings that Hall was a credible witness are not supported by supported by substantial evidence.

Testimony of Attorney Keith Hall

Keith Hall was admitted to the Washington State Bar in 2004. RP 550. His practice has always been in criminal defense. RP 550. His primary work had been misdemeanors and gross misdemeanors prior to this case. RP 550-555. He had tried 3-4 felony cases. This was his first murder case. RP 555.

Hall considered this to be a "very major"case. RP 602.

Hall made no notes during his representation of the petitioner. RP 569.

Although he has no recollection of it, he knows he handled the arraignment in this matter. RP 64. He probably learned what the State was actually going to charge prior to going on the record. RP 563. At arraignment he filed a limited notice of appearance and a notice to law enforcement not a have contact with petitioner. RP 680. The later is a standard form prepared by the Department of Assigned Counsel. RP 680-681.

Hall later filed his firm's standard of appearance, a document containing numerous discovery demands. RP 682-683. Beyond filing that document, Hall took no action on it. RP 683.

Petitioner's Exhibit 71, a log of visits to the jail, did not record any visits between Hall and Musga on the date of arraignment. **Appendix C.**

Sometime after the arraignment, Hall recalled that he and Warner met with Musga in the jail. RP 566. He does not recall the purpose of the initial meeting. RP 566. In a normal situation, they would have introduced themselves, explained who they were, what was happening, provided information about what happens in a criminal case, and other general information. RP 566. If they had discovery or other documents, they would have gone over these with petitioner or provided them to him, "that sort of thing." RP 566.

Hall does not recall ever discussing the charging document with petitioner. RP 568. It is not his practice to read the document to clients unless there is some reason to believe that the client cannot read it on his own or otherwise does not understand it. RP 568. He also does not read the declarations for determination of probable cause. RP 568-569. He thinks the document would have been shown to the client early in the case and then taken back. RP 569. This would happen early in every case. RP 569.

Hall believes it is imperative to go through all of the discovery with a criminal defendant in every case. RP 569. "Going through the discovery is probably one of the most important things with the client is the only person that can give us information regarding that discovery, having been there allegedly at least for the crime." RP 570. Hall understood that discovery had been reviewed with petitioner except for a few pieces he opted not to look at. RP 570-571.

One of the significant discovery items was a taped statement Musga had given to police. RP 599. The recording commenced at 10:29 a.m. and ended at 12:55 a.m. [p.m.] RP 600. [The interview tape lasted 146 minutes.] This taped statement would have been played for him. RP 603.

Another significant piece of discovery was the taped statement provided by Laura Colley, Musga's girlfriend, in the presence of her counsel. RP 602. That statement commenced at 10:05 a.m. and ended at 12:25 a.m.[p.m.], for a total of 140 minutes, RP 603.

On August 13, 2013, the State sent a letter to the defense with "a plea offer." RP 606. The State informed the defense that Musga had until August 30, 2013 to agree to plead guilty as charged without any agreed sentencing recommendation. The State intended to seek an exceptional sentence above the standard range. The State informed the defense that if Musga did not do so

it would file an Amended Information charging him with Count One: Aggravated Murder in the First Degree; Count Two: First Degree Premeditated Murder; Count Three: First Degree Felony Murder predicated on First Degree Rape of a Child; Count Four: Second Degree Intentional Murder; Count Five: Second Degree Felony Murder Predicated on Assault. The State intended to file five aggravating circumstances with each charge. RP 607.

When the State's August 13, 2013 letter was received, defense counsel had not yet begun to interview any witnesses. Hall explained, "Our hope was that when we finished receiving all discovery, we could begin witness interviews and that part of the investigation." RP 609. Hall conceded that defense never knows when defense will "finish" receiving discovery and that defense gets discovery throughout the case, even during trial. RP 609.

There had been no witness contacts. RP 612. There had been "some talk" about going to the Commencement Terrace, the apartment building where the death occurred. RP 612. The defense had not made a list of witnesses to interview. RP 614.

Hall did not recall any discussion of witnesses who had made contradictory statements to police, whether statements that were internally

inconsistent or inconsistent with other witnesses. RP 616. Defense had spoken only to the Musga family, petitioner and his mother. RP 616-617.

The defense investigator Snyder would not have done any interviews without instructions from the attorneys. RP 621.

There was no reason the defense could not have interviewed Karen Howard, the woman in the downstairs apartment who stated that adults were running around, arguing loudly, and dropping things in the hours preceding the call to 911 Ricky Saldavia, the individual who was present in the lobby when petitioner went downstairs to call 911 and also administered CPR to CC; Cathy Colley, the grandmother of CC. RP 621-623, Defense could have attempted to interview Laura Colley who may have had counsel at that time by contacting her counsel. RP 622.

After the offer came in, Hall and Warner assessed whether or not they were in any position to go to trial on the scheduled trial date and they agreed that they were not. RP 623-624. "We weren't ready to go to trial, absolutely." RP 627.

Hall did not remember whether he and Warner told petitioner or Janet Musga that they were not ready to go to trial. RP 624. However, he later thought they had told petitioner that they could not be ready by the November 18, 2004 trial date. RP 627-628.

Hall believed that the State's proposed resolution time seemed fast in a case where he had contemplated a lot more discovery and investigation. RP 625.

Hall testified that it was "certainly possible" he and Warner discussed setting the case out, even prior to the offer, to later in the year or even early 2014. RP 625.

They did not go before the court with a motion to continue because the State had imposed such short time limits on the offer. RP 626. They did not need a continuance because they set a plea. RP 62

Defense counsel could not recall asking for an extension of the expiration date of the offer. RP 629-630.

Hall was asked a series of questions about his assessment of the offer:

> **Q:** And did you make an assessment of their intention to file Aggravated Murder if you didn't this offer by the 30th, assess the elements against what you believed you could accomplish in an investigation that –
> **A:** Sort of weigh the down side of what they were going to do versus the upside of our investigation and what might happen?
> **Q:** We,, you must had – well, tell me, did you or did you have any expectations of what you could accomplish in witness interviews?
> **A:** I had an expectation that things would become clearer. I didn't necessarily know what we would accomplish. We would get more information.
> **Q:** Had you indexed the statements of the witnesses to – I am not going to write on this. Had you indexed the statements of the

witnesses so that you could determine whether or not the witness statements were internally consistent?
A: I don't remember.
Q: Is that something you would do?
A: Maybe I am not sure what it is. Yeah.

. . . . . .

Q: Do you agree or disagree that would be a useful tool to determine whether or not that individual would someone that could be successfully cross-examined at trial?
A: Yes.
Q: In addition to determining whether the witness's testimony was internally consistent, you would also, would you not, want to determine whether or not testimony was externally consistent with the testimony of other witnesses?
A: Yes.
Q: Because that goes to credibility?
A: Yes, if you are going to call another witness to impeach them, for instance, or something like that, yes.
Q: Even just to sort of globally look at the case, correct?
A. Yes.
Q: Did you do that?

. . . . . .

Q; Had you done that in your mind – had you done that in your mind?
A: With the information we had, it would have been more helpful to have interviews and gotten more information so we could ask the questions instead of, for instance, law enforcement asking the questions because there is always more information we want to know.
Q: *Is – can you tell me whether or not it is your understanding that one of defense counsel's function is to perform a thorough investigation of the case prior to advising his or her client about entering a plea?*
A: Yes, I would agree.
Q: And you would agree, would you not, that wasn't done?
A: Well, I think we could have done better? Yes. Did we do an investigation? Yes, I guess that is what I would say.
Q: The investigation that you did reviewed the discovery that you had.

A: Uh-huh.
Q: You believed you reviewed all of it with Jake?
A: Either myself or Mr. Warner.
Q: 100 percent?
A: I am never 100 percent about anything.
Q: It would have been your practice that all of the discovery would have been reviewed?
A: There is a lot of discovery here. It is possible a page was missed, something was missed yes. It is my practice to go over everything with the client or give them the opportunity to look over it anyways.
Q: There's a difference between those, right? Looking over it and giving him the opportunity?
A: Yes, there is a difference.
Q: With the exception of the photos, you believe Mr. Musga saw or heard everything?
A: I don't know for certain.
. . . . . .
Q: Can you tell us whether or not there was any investigation conducted outside of your office?
A: I can't tell you because I don't remember.
RP 630-634.

Hall could not recall meeting with petitioner regarding the offer. RP 638. He could not recall meeting with Janet Musga about the offer or otherwise discussing it with her. RP 638-391. He vaguely recalled a discussion with Janet Musga but could not recall whether it was over the phone or in person. RP 642.

Hall looked at the jail visit log and agreed that he must have present at the one hour jail meeting with Warner and Musga on September 6. RP 640-641. He agreed that the timing would have been right for that meeting to be

the meeting to prepare the plea paperwork but he had no recollection about that. RP 640-641. He had no recollection at all of going to the jail on September 6, 2009. RP 641.

Hall had no recollection of participating in the entry of the plea, although he thought he had. RP 642. He could not recall whether he had met with petitioner prior to the plea to ascertain whether he had any questions about the plea he was going to be entering. RP 642. He could not remember when he first saw the plea paperwork although he was certain he saw it at the plea because he was there. RP 642. He had no recollection of petitioner at the plea hearing except that he was present. RP 642.

Hall never told Jake what the prosecutors were going to recommend to a sentence at the time of plea because he did not know. RP 692.

Testimony of Deputy Prosecuting Attorney Angelica Williams

The State never put in writing in either its specific "plea offer" or on the plea paperwork that it intended to recommend an exceptional sentence upwards of 60 years. RP 873, Ex. 62-A; Ex. 63. DPA Williams agreed that it is possible that she never informed the defense that the State intended to ask for 60 years. RP 899. The state did not inform defense it intended to ask 6-60 years either in its' offer letter or on the plea form. RP 872-873.

Had the defense asked for a continuance to investigate the case, DPA Williams believed the State would have agreed, given the nature of the case. RP 878. Both deputy prosecutors believed very strongly about the facts of their case and may have been willing to extend the offer along with the grant of a continuance. RP 900. Extension of the offer was a harder issue than the grant of a continuance for trial. RP 900. She did not recall ever discussing the subject of continuance with co-counsel, DPA Jared Ausserer, or any other attorney in that office. RP 921-922.

DPA Williams reviewed and signed off on the plea paperwork before it was presented to the court. RP 884. She agreed that although the box was checked to the statement beneath the prosecutor's recommendation in paragraph 6(g) that the prosecutor will recommend as statement in the plea agreement, which is incorporated by reference, there was no such document attached. RP 891-892. She agreed that the State's recommendation would have been clearer had she written "state seeking exceptional upward." RP 893-894.

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Williams did not know the process for filing aggravated murder cases within the Pierce County Prosecuting Attorney's Office. RP 879.
She thought that there might have to be a staff meeting with the elected prosecutor and other attorneys as to whether to seek the death penalty, but she had never participated in such a case before RP 879

Testimony of Deputy Prosecuting Attorney Jared Ausserer

When Ausserer set the plea deadline, he knew that the DNA results were not complete. RP 331. Ausserer did not care about the DNA results. RP 331.

Ausserer did not think the State would have had a basis to oppose a continuance in the case until after his paternity leave ended in February 2010. RP 334. He did not recall conveying this information to defense, focusing instead on the plea deadline. RP 334. Likewise, he might have extended the date on the plea offer if there had been a change of circumstances as the case proceeded. RP 335. He did not convey that to defense either. RP 335.

Ausserer did recall Hall asking for continuance of the August 30 deadline "given the strength of the State's case." RP 335-336.

Ausserer recalled that Hall based his request on the need "to extend the date to confer with Mr. Musga so Mr. Musga had sufficient time to contemplate my offer and what the amendment would be, should he not

accept the offer." RP 335. Ausserer denied that request. RP 335. Ausserer testified that he probably would have agreed to a continuance if Hall had approached him and stated that "he was not prepared to advise him adequately about your offer." RP 336.

Ausserer could not recall that the defense asked to interview any witnesses. RP 340. The defense never asked to view the property/physical evidence in police custody. RP 340-341.

Ausserer recalled that defense counsel met with him in his office on Thursday, August 29, 2009, the day before the plea offer expired. RP 343, 344. After that meeting, they informed Ausserer that they were accepting the offer. RP 343-344.

Ausserer acknowledged that although both Exs. 63-64 (petitioner's statements on pleas of guilty incorporated in Paragraph 6, "Prosecutor will recommend as stated in the plea agreement." RP 349. He acknowledged that there was no such plea agreement incorporated in either plea statement. RP 349, 350, 351, 355.

Had the defense provided Ausserer with evidence that the anal trauma could have been inflicted as much as 18 hours before treatment, then the State might have reopened its offer. RP 378-79. He definitely would have considered that. RP 380. Had Ausserer known that CC was up for adoption,

his view of the differing dates of the injuries probably would have been affected. RP 380. Had Ausserer been aware of a CPS history for physical abuse of CC by the Colley's, that information would potentially affected his view of the case. RP 380-81.

Ausserer testified that he "indicated" to defense counsel his "belief" that something in excess of 50 years was appropriate in this case. RP 523. He told them that he believed a judge was going to impose a sentence in excess of 50 years and that anything less "was unacceptable to me for what I believe Mr. Musga did in this case." RP 523. Ausserer stated that a death sentence was available in this case although he also testified that he told defense counsel that he would not be filing notice of death. RP 524. Ausserer made clear to defense counsel his firm opinion that he could not lose this case because his evidence was just so strong. RP 524.

Neither Williams nor Ausserer had ay familiarity with how death penalty cases were staffed or death penalty decisions were made in the Pierce County Prosecuting Attorney's Office at that time. **RP 879.** Unfortunately for petitioner, neither did defense counsel.

Although Ausserer knew that defense counsel has an obligation to investigate all evidence and to receive all discovery before advising their

client with respect to a plea, he did not care whether they had the DNA evidence because the State did not think it had evidentiary value. RP 527.

However, Ausserer could conceive abstractly that DNA results that did not match CC but instead matched someone else, could have had an effect. RP 529. Ausserer was comfortable with the absence of DNA results because there was no challenge to the timing of the infliction of the injuries. RP 530. Ausserer was steadfast in his refusal to extend the offer beyond August 30, 2009. RP 532.

Testimony of Todd Maybrown

Todd Maybrown, a Washington attorney and recognized expert on the subject of ineffective assistance of counsel, testified in this case. RP 1094-1107. He had examined the documents from the court file, discovery in the case, files of defense counsel, and other materials. **RP +++.**

In his own practice, he had handled a child assault case where the victim was a very young child with serious injuries and the defendant, the mother's boyfriend, had been protective of her during the investigation. RP 1105-1107. That case reminded Maybrown of this case because he investigated and won the case after determining that the mother was the responsible party. RP 1108.

Maybrown's expert opinion is that competent counsel needs to conduct at least three investigations in every criminal case: (1) a factual investigation of the offense charged; (2) a mitigation investigation into the life of the client; and (3) an investigation on purely legal matters. RP 1108-1109.

Maybrown opined that unless counsel carefully reviews discovery materials with the client, it is inconceivable that the client could ever make an informed decision about what to do. RP 1112. The client must know the true risks at trial, whether the state can prove its case, what defenses there will be **and what a trial will look like. RP 1112.**

Counsel must explain the charges in the context of the original Information, Declaration and Determination of Probable Cause. RP 1128.

Counsel must carefully explain the distinction between elements and aggravating circumstances and the potential consequences of the latter RP 1128.

In this case, there is nothing in the charging document that indicates the impact of the aggravating circumstances and so the trial must be carefully explained. RP 1130.

In his review of the materials in the case, Maybrown saw no evidence that defense counsel had conducted any factual investigation. RP1108. He saw

no evidence of a mitigation investigation prior to the plea or any investigation into legal matters. RP 1109.

His factual investigative strategy was testified to in detail. RP 1114-1118; 1131-1135. Maybrown emphasized that a defense investigator should have been independently interviewing the witnesses as soon as counsel was retained. RP 1138

Further, given the serious nature of the case, he would have expected there to be several hundreds of hours of client contact. RP 1124. Discussion of petitioner's statement to police would have consumed many hours, discussions of the fine points of the charges to which petitioner had the option of pleading guilty, the elements therof, the state's evidence and the state's ability to prove the charges would have taken many hours. There were often unique sentencing consequences as well-murder in the first degree is a strike offense RP 1093-1215, and of course, defense counsel was required to spend time advising relations regarding aggravative murder, whether the state would prove it, and the likelihood that the state would carry out its' threat to seek the death penalty. *Id.* Maybrown's professional opinion was that Warner provided ineffective assistance.

B. LAW AND ARGUMENT

A. Standard of Review.

To obtain relief on collateral relief based on constitutional error, the petitioner must demonstrate by a preponderance of the evidence that he was actually and substantially prejudiced by the error. *In re the Personal Restraint Petition of Davis*, 152 Wn.2d 647, 671-72, 101 P.3d 1 (2004). "[I]f a personal restraint petitioner makes a successful ineffective assistance of counsel claim, he has necessarily met his burden to show actual and substantial prejudice." *In re Personal Restraint Petition of Crace*, 174 Wn.2d 835, 846-47, 280 P.3d 1102 (2012).

In order for a petitioner to prevail on an ineffective assistance claim, he must overcome the presumption that his counsel was effective. *State v. Thiefault*, 160 Wn.2d 409, 414, 158 P.3d 580 (2007). To do this, he must demonstrate that "(1) 'counsel's representation fell below an objective standard of reasonableness' and (2) 'the deficient performance prejudiced the defense.'" *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 35, 296 P.3d 872 (2013) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Accordingly, to prevail on his claim, petitioner must first prove that trial counsels' "acts or omissions were outside

the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. He must then demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. As such, appellate review of claims of ineffective assistance of counsel necessarily require review of trial counsel's past performance.

As to the first requirement, the petitioner must show that counsel's performance fell below "an objective standard of reasonableness." *Id.* at 688. Reasonable tactical choices do not constitute deficient performance. *Id.* at 689.

But strategic decisions are entitled to deference only if they are made after an adequate investigation or facts or are supported by reasonable professional judgments. *Id.* at 690-91; *see also, State v. Maurice*, 79 Wn.App. 544, 903 P.2d 514 (1992).

The Washington courts have reiterated time and again that trial counsel in a criminal case has a duty to investigate. In *State v. A.N.J.*, 168 Wn.2d 91, 111, 225 P.3d 956 (2010). The Washington courts have held that the failure to investigate, at least when coupled with other defects, can amount

to ineffective assistance of counsel. *In re Brett*, 142 Wn.2d 868, 882-83,16 P.3d 60 (2001).

Counsel's duty to investigate is a critical part of the case whether it resolves by plea or trial. This is so because Due Process requires that a guilty plea may be accepted only upon a showing the accused understands the nature of the charge and enters the plea intelligently and voluntarily. CrR 4.2(d) prohibited the court from accepting a plea without first assuring the defendant understood the "nature of the charge and the consequences of the plea."

Similarly, a constitutionally invalid guilty plea gives rise to actual prejudice. *In re Montoya,* 109 Wn.2d 270, 277, 744 P.2d 340 (1987).

The State argued that *A.N.J.* set forth a minimum acceptable investigation in a serious felony case. In the Findings on alleged deficiency on Factual Findings No. 1, the trial court erroneously relied on *State v. A.N.J.,* 168 Wn.2d 91, 101-102, 109 (2010) for the proposition that in that case the Court found that "counsel for a juvenile defendant, who entered a plea to Child Molestation in the First Degree, made no requests for discovery, filed no motions, spent as *little* as 55 minutes with the juvenile before the plea, met with the juvenile three times, did no investigation, did not consult experts, and did not carefully review the plea agreement." (sic). Although that sentence is incomplete, in

context with the remainder of the paragraph, the trial court appears to have adopted the State's argument that no binding authority requires defense counsel to perform an investigation in a criminal case prior to a plea, but that at the very least counsel must evaluate the evidence and likelihood of conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty. *Id.*

Of course, the Court in A.N.J. found counsel's performance to be constitutionally ineffective and remanded the matter so that the juvenile could withdraw his guilty plea. *Id.*

This finding misstates the law. *A.N.J.*. in fact discusses at great length defense counsel's obligation to conduct an investigation prior to advising her client whether to enter a guilty plea.

The Court stated, "While no binding opinion of this court has held an investigation is required, a defendant's counsel cannot properly evaluate the merits of a plea offer without evaluating the State's evidence." *168 Wn.2d at 110.* The Court then cited with approval the concurring opinion of Justice Saunders from *State v. Bao Sheng Zhao*, 157 Wn.2d 188, 137 P.3d 835m 843 (2006):

> The United States Constitution and the Washington Constitution both guarantee a criminal defendant the right to counsel. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. To provide constitutionally adequate representation a criminal defendant's counsel "'must, at a minimum, conduct a reasonable investigation enabling . . . informed decisions about how best to represent [the] client.'" *In re Pers. [*205] Restraint of Brett,* 142 Wn.2d 868, 873, 16 P.3d 601 (2001) (emphasis omitted) (alteration in original) (quoting *Sanders v. Ratelle,* 21 F.3d 1446, 1456 (9th Cir. 1994)). And the prosecution may not interfere with this investigation. *State v. Burri,* 87 Wn.2d 175, 180, 550 P.2d 507 (1976). Interviewing witnesses is an essential part of a reasonable investigation. Defendant's counsel cannot properly evaluate the merits of a plea bargain without fully investigating the facts.

Competent counsel has a duty to investigate. *In re the Personal Restraint Petition of Brett,* 142 Wn.2d 868, 873, 16 P.3d 601 (2001). The presumption of counsel's competence can be overcome by showing a failure to investigate: "Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts and introduction of expert testimony." *Hinton v. Alabama,* 134 S. C. 1081, 1088, 188 L.Ed.2d 1 (2014) (quoting *Harrington v. Richter,* 562 U.S. 86, 106, 131 S.Ct. 770, 178 L.Ed.. 624 (2011). Courts will not defer to trial counsel's uninformed or unreasonable failure to interview a witness. *State v. Jones,*183 Wn.2d 327, 340, 352 P.2d 776 (2015).

In this case, trial counsel by their own admission failed to interview *any* witnesses during the five month period between arraignment and entry of plea [April 3, 2009 – September 9, 2009]. Attorney Warner, by his own

admission failed to ask probative and helpful questions of the only expert consulted – rather, he merely asked the expert to opine whether the medical examiner's report was consistent with the medical record. In *A.N.J.*, the child's attorney spent less than an hour with the child, did no independent investigation, did not consult experts, and did not carefully review the plea agreement with the child. 168 Wn.2d at 101-102.

The Court held that A.N.J. was entitled to withdrew his plea. *Id.* However, *A.N.J.* did not specify what investigative acts were too little in a given case because, of course, such analysis is intensely fact specific. Instead, the court held that "*counsel must reasonably evaluate the evidence against the accused the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to where or not to plead guilty.*" 168 Wn.2d at 109, 111-12. It is well-settled that trial counsel's duty to investigate is not abrogated by a client's admission of guilt or the attorney's belief that their client is guilty. The duty to investigate is not eliminated by the client's own conclusions or admissions of guilt, because the client's beliefs may not coincide with the necessary elements of proof to establish guilt in law. *Benjamin J.Harris, III, by and through Judith H. Ramseyer, Guardian ad litem, Petitioner, v. JAMES BLODGETT, Superintendent Washington State Penitentiary, Respondent*, 853 F. Supp. 1239 1256 (1994).

This is so because the client may not be aware of the significance of facts regarding intent, mitigation, suppression of evidence, or impeachment of witnesses that only an independent investigation can uncover. *See* ABA Standard 4-4.1, Commentary at 4.54. *Id.*

Further, this obligation cannot be short cut because of counsel's professional experience or his prior personal experience with the defendant. Counsel's experience and knowledge are not admissible evidence. *Id.*

Established caselaw holds that failure to investigate in interviewing witnesses prior to trial constitutes IAC. The rule should be identical in the guilty plea setting under the same logic. Trial counsel cannot meet his obligation to advise petitioner of the significance of the facts and/or possible impeachment evidence and the strength thereof absent witness interviews. "The most able and competent lawyer in the world can not render effective assistance in the defense of his client if his lack of preparation for trial results in his failure to learn of readily available facts which might have afforded his client a legitimate justiciable defense." *McQueen v. Swenson,* 498 F.2d 207, 217 (8th Cir. 1974) (citations omitted). *See also United States v. Tucker, supra.* This circuit has held that, "[t]o make an informed decision whether to call . . . a witness at trial, [defendant's] attorney was obligated to make an independent assessment of [the witness's] account . . . and credibility as a

witness." *Howard v. Clark*, 608 F.3d 563, 571 (9th Cir. 2010), aff'd at *Howard v. Biter*, 474 Fed. Appx. 631 9th Cir. Cal. 2012). Howard specifically noted the obligation to "attempt to interview" a key witness. *Id.* (quoting *Avila v. Galaza*, 297 F.3d 911, 920 (9th Cir. 2002)).

This court reviews such challenges to findings of fact for substantial evidence. *Soltero v. Wimer*, 159 Wn.2d 428, 433, 150 P.3d 552 (2007) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 942, 845 P.2d 1331 (1993)). Thus petitioner bears the burden of showing that there is not sufficient evidence to persuade a reasonable person of the trial judge's findings. *Nordstrom*, 120 Wn.2d at 939-40 (citing *Grein v. Cavano*, 61 Wn.2d 498, 507, 379 P.2d 209 (1963)).

That is easily accomplished on the challenges to the enumerated the Findings of Fact [FOF] below. These insufficient FOF require affirmative answers to the two issues sent for resolution by this court.

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FINDINGS OF FACT ON CREDIBILITY:

Testimony of Richard Warner:

The trial court's finding of credibility on issues regarding trial was not supported by substantial evidence. Warner had a very poor recollection regarding his actions in the case, hindered by the passage of time as well as his failure to take notes or otherwise document his few contacts with defendant. RP 699.

Warner's recollection of significant actions taken in the case were unclear and often conflicted with those of co-counsel, that is, when co-counsel had any memory regarding them. RP 208.

Warner did not know if his investigator accomplished requested tasks, such as compiling even a single criminal history on any witness. RP 209.

Warner could not recall if the investigator had written a single report. RP 210. Warner could not recall how much discovery in fact had been reviewed with petitioner. RP 506. Warner could not remember if co-counsel was present for the important process of reviewing and explaining the plea paperwork with petitioner. RP 225, 264, 269, 843. He "guessed" that petitioner had been given a copy of the charging document at arraignment although he was not certain. RP 249.

[Note: both eye-witnesses and participants at the arraignment, Keith Hall and petitioner testified that petitioner did not receive a copy of the information at arraignment or at any time thereafter . This fact would not be reflected on a transcript of the arraignment, as respondent avers.] Warner could not recall whether he ever advised petitioner that he could have the aggravating factors tried to a jury and, if so, whether he wanted a jury trial on them. RP 235. Although Warner may have been credibility and candidly forgetful, he was inconsistent internally in his testimony, his testimony was inconsistent with co-counsels as shown below, inconsistent with that of the deputy prosecutors.

Warner had a motive for his forgetfulness – obviously no attorney wants to be labelled ineffective which potentially has adverse consequences with the Bar, the Public Defender Assocations which provide 75% of Warner's practice work, as well as exposure to potential civil liability.
All of these factors should have caused the trial court to question his credibility and testimony. To the extent that the trial court relied on Warner's statements as proof of effective representation, the trial court erred in finding him credible. FOF 2. Attorney Keith Hall: His testimony was marred with assertions of lack of memory and contraditions of co-

counsel. He knew he attended the arraignment but he could not recall many details. His recollections of the few details he could muster were contradictory. He could not remember if he was present when Warner went over the plea paperwork with petitioner.He agreed with Warner on some points. He did remember presenting the plea offer to petitioner with Warner on August 29, 2009. There were major disagreements, however. For example, Hall adamantly maintained that defense counsel reviewed every piece of discovery with Musga. Warner denied that this occurred and that only select pieces of discovery were shown to him and these were shown to him when Musga asked to see them. Hall's testimony was not so persuasive as to override the testimony of any other witness. Hall was neither more nor less credible than Warner.

3. Jake Joseph Musga: Unlike the other witnesses, Musga is not a professional in the legal field, has no knowledge in the law, is not familiar with legal terms, had never before testified, and was testifying regarding events that occurred shortly after he turned 19 years old. At that time, he was an untreated heroin addict who had used as recently as the early morning of his arrest. Tacoma Police Department Detective Louis Nist testified that she was unfamiliar with the symptoms that an individual

under the effects of heroin [an opiod] would exhibit. Musga was not a high school graduate. He relied upon and accepted the advice of his highly paid defense attorneys to whom his parents had given $105,000. In 2013, Musga wanted to go to trial. When confronted with the State's threat to file aggravated murder with a sentence of death or like without possibility of parole [LWOP] if he did not plead guilty as charged to an open recommendation – State recommending exceptional sentence, Musga chose to plead guilty to the original information because he did not want to die in prison.

Musga had no opportunity to raise the claims raised in the personal restraint

petition at any superior court hearing and his credibility cannot be determined based on

his failure to interrupt the trial court during the plea or sentencing hearings. This court finds that to the extent Musga's conduct comported with that of the significant majority of criminal defendants, Musga's credibility is enhanced.

Musga's testimony that [1] he was inadequately advised of the evidence against him before the plea is credible because Warner and Hall both admitted that they had done no substantive investigation before the plea, had not shown

him complete discovery, and were waiting for all discovery to be received to interview a single witness – even though the trial date was November 18, 2013; Warner and Hall could not advise Musga whether the State's case was provable at trial or not, whether defendant had strong points of attack. [2] Similarly Musga's testimony that he was inadequately advised of the elements of the charges and the separate aggravating circumstances is credible because he never received a copy of the Information, his attorneys do not recall ever explaining it to him, they failed to bring one to the meeting when they prepared the plea paperwork with him. Further, in going over the plea, Warner testified that he read the two plea forms to Musga and would have stopped only to answer Musga's questions. Merely reading the plea forms is sufficient to explain how including language pleading guilty to non-elements [the aggravators] affects the State's ability to impose an exceptional sentence. The plea form does not contain any portion which requires counsel to set forth aggravating circumstances; which, if any, the State will rely upon for a departure from the standard range; and what the State's recommendation will be. In paragraph 6[h] of the plea forms, Musga received conflicting advice about how an exceptional sentence could be imposed. However, what was clear to him was that neither 6[h][iii] a stipulated exceptional sentence; or 6[h][iv] applied in his case because the State had provided written notice of

intent to seek an exceptional sentence with notice of the aggravating factors, the obligation to prove the aggravators beyond a reasonable doubt, and the duty to do so before a jury or the court, at the defendant's election. [Exs. 63, 64]. Musga had little, if any, opportunity to read and consider the content of paragraph 11 of each statement and Warner failed to advise him that these statements contained aggravating factors. [Exhibits 63, 64]. The sole reference in the plea transcript that Musga was pleading to aggravators is contained in the prosecutor's opening comments. [Ex. 62]. Neither defense nor the trial court commented or inquired about this to determine if Musga understood this. *Passim.*

Jake's statements to Dr. Muscatel and Joe Sofia about what he "thought" the State would recommend were just "thoughts." He had no concrete knowledge. He had seen the plea forms where the State averred that it had an open recommendation. Neither Warner nor Hall ever stated that they gave any number of months or years that the State would recommend. The defense attorneys, who were told by the State that they could recommend low end, in fact recommended mid-range of 300 months [25 years]. This comports with the number Musga told Dr. Muscatel. [Ex. 52].

Musga is a credible witness. He had inconsistencies in his testimony as do his attorneys and his mother. He has a strong motive to testify in order to extricate

himself from his plea, which did not meet the standard of knowing, intelligent, and voluntary. He has always wanted his case investigated and took the plea to avoid being killed by the State of Washington. Had his attorneys conducted an effective investigation and given him proper advice, he would not have done so. Given the egregious facts of this case and his ignorance of what his attorneys should have done for him, he had no reason to misrepresent their actions. Their actions, or lack thereof, speak for themselves.

Musga was crystal clear that he always wanted to go to trial. He folded only after the August 29, 2009 discussion with his attorneys when he realized that they could anot be ready for th November 18, 2009 trial date, would not ask for a continuance, and that the State would file aggravated murder if he did not plead guilty to first degree murder and first degree child rape. He understood that the only two possible sentences for aggravated murder are life without parole [LWOP] or death. To a 19 year boy, either sentence is death in prison. Musga could not accept such sentence. He lost confidence in his attorneys , who had done nothing for him. After less than 24 hours [and his attorneys confirm that they gave him the offer on August 29th with the cut-off of August 30th], he agonized and took the offer upon the advice of his mother Janet Musga.

4. Janet Musga: This civilian witness is the mother of the defendant. She has not testified before , was nervous, and often flustered by the questions. Ms. Musga clearly believed that the entire criminal justice system had failed in this case. She was disappointed that Warner and Hall did no investigation, that there was a rush decision to be made whether to take a plea or not, that the attorney were not and could not be ready to meet the November 18, 2013 trial date. She regretted recommending to her son that he take any plea. However she did so because she did not want him to die at the hands of the State of Washington. Her testimony was credible. This court gives no reliance to Ex. 29, as proposed by the State as this exhibit was never admitted at the reference hearing. There is no indication that Ms. Musga was willing to lie or mislead the court. Her testimony comports with that of Warner and Hall regarding their meetings with her during the case, their regular phone and email contacts with her, her statements that she wanted them to investigate the case and inquiries regarding what they had done, her attendance at court hearings, her meeting at their office prior to her son's acceptance of the plea. Ms. Musga is a credible witness.

Todd Maybrown: He is a credible. He is a scholar of the law and a recognized expert on the subject of ineffective assistance of counsel. He often is retained to review cases to opine whether counsel has failed to provided

effective assistance. Maybrown testified that he has found ineffective assistance of counsel in only very few cases. He therefore has no bias in favor of petitioners in these cases. Maybrown reviewed materials provided by petitioner which are itemized in his declaration, incorporated in the personal restraint petition and testified to at trial. He also was aware of the lack of content in the files of Warner and Hall --- pristine police reports, nine pages of undated notes, the retainer, and a few letters. Warner and Hall in fact did little more than what was in the materials Maybrown received. Maybrown's testimony addressed the duties of competent defense counsel in criminal cases. Maybrown emphasized that counsel's first and most important duty was to spend time with the client. He stressed that it is essential to build rapport and trust with the client so that the client will be forthcoming with information and receptive to counsel's ideas and advice. He recommends at least weekly meetings. He testified to counsel's duty to conduct a thorough investigation prior to advising the client regarding the strength of the State's case – a consideration the client should consider if a plea is a possible resolution; what witnesses and defenses were available for the defense; what experts should be consulted and retained – what questions should be posed to experts; counsel's duty to investigate the charges – could the State prove all of the elements of the charges, what defenses could be interposed; if the State

intended to amend the information, could the State in fact make a case for the proposed amended charges. Maybrown testified to counsel's duty to conduct mental and psychological screening of the client at the outset of the case, to obtain all medical/treatment/educational records for the client and to interview family members and others close to the client. He testified to counsel's duty to prepare mitigation materials, particularly in a murder prosecution. Maybrown testified that counsel needed to meet with the prosecution several times to discuss the client and the case.

Maybrown testified first as an expert on the duties of criminal defense attorneys generally and then specifically to this case.

Maybrown had no motive to testify for Musga, has consulted in the vast majority of cases and not found ineffectiveness. He made a thorough review of counsel's limited case file and various police reports. He rendered the credible opinion that Warner and Hall failed to provide constitutionally effective assistance of counsel to Musga.

Although the court questioned his credibility in part because on information provided by the defense, the court has not identified what information defense imparted to him that would make his testimony suspect. Maybrown testified to everything that he relied on and the State knew of his testimony in advance of the reference hearing, had his report, as well as access to him.

The court further found that Maybrown's credibility could be affected by the distorting affect of hindsight. This is classic language from cases discussing IAC. Of course, any entity reviewing a record for IAC may be subject to this criticism. The infrequency with which Maybrown finds IAC affirms that he is credible.

Brian Vold. His limited testimony was credible.

Angelica Williams. She seemed credible but had memory issues. On many points, she lacked any memory and demanded to see emails on the subject before answering the questions. However, she testified that the State would have granted a continuance of the trial had the defense requested one.

Jared Ausserer. His credibility was marred by his anger, which did not comport with his role as a public prosecutor. He was adamant about the "offer" and testified that he saw no reason to extend the deadline because he was "personally convinced" of Musga's guilt. He would not have agreed to a continuance unless there was a "really good reason", something other than the outstanding DNA tests. His zeal to convict and maintain the conviction of Musga underpinned his testimony.

FINDINGS OF FACT ON QUESTION NO. 1:

QUESTION NO. 1: Did Petitioner's trial counsel adequately investigate his case and the State's evidence against him?

Findings on alleged deficiency.

FOF 1: Petitioner has assigned error to and disputes the entire content of this FOF.

(a) *The timing of the offer in this case is irrelevant to the adequacy of trial counsel's investigation.*

This case is wholly distinguishable from ANJ, supra, where case events proceeded quickly. There, ANJ was arraigned on 8/2/14, had a pre-trial conference where the state made a plea offer on 9/14/14, reviewed plea paperwork with his counsel on 9/17/14 and entered a guilty plea on 9/22/14. 168 Wn. 2d at 100-101. Of course, the court held ANJ's counsel to have provided constitutionally ineffective assistance. Further, the trial court's reliance on State v. McCollum, 88 Wn App 977, 982 (1997) for the proposition that a defendant's early decision to plead guilty can provide a reasonable explanation for cutting short investigation is misplaced. McCollum enticed an early plea because he had agreed to a very favorable contract with police to work as a confidential informant for which he would receive an exceptional sentence downwards and a dismissal of firearms

sentencing enhancement. After McCollum failed as a CI, he sought to withdraw his plea. This case stands in stunning contrast to A.N.J., supra. However, notwithstanding that case, in the instant case, trial counsel made an inexplicable decision to defer witness interviews, the most important component of this case, until discovery was "complete" and also failed to appropriately use its medical expert in a prompt and timely manner.

Trial counsel had an illogical plan to defer witness interviews until was complete, at the same time acknowledging that the State continues to provide discovery even during trial and that discovery is never really complete in a criminal case. RP 611.

The court held that trial counsel's "investigation was adequate to inform petitioner's plea" while noting that trial counsel's time to conduct an investigation was restricted by the tight timeline for plea offer which came "only a little over four months after arraignment." CrR 3.3 provides for a 60 day time for trial limit for an in-custody defendant. There is nothing about the 4 month interval between arraignment and offer precluded any investigation.

Neither counsel anticipated receiving plea offer in August. They both anticipated the case would proceed to trial. Both attorneys also anticipated that the case, which was set for trial on November 18 2009, likely would be

continued beyond that date. Frankly, trial counsel simply appears to have been disorganized or occupied with matters other than this case.

However, no delay provided, justified their failure to promptly interview the critical civilian witnesses. Karen Howard, who heard *adults* running in the apartment where petitioner alleged inflicted the fatal injuries on CC and at the very time the government alleged this occurred, should have been interviewed immediately.

Trial counsel potentially could have learned whether Howard heard male or female voices/ how many people she saw when she went to the door and her descriptions of them.

The significance of her testimony cannot be understated. During the government's closing argument, the government argued that it could have proved the element of premeditation for premeditated murder.

(b) *Trial counsel failed to investigate notice of amendment to aggravated murder.*

Under 10.95, aggravated murder could be predicated, and was identified in this case as would be predicated in this case, on concealing the commission of a rape or crime. It can also be based on a murder committed – premeditated murder committed in the course or furtherance or flight from a rape. RP 1650.

Of course, the State is simply wrong about how aggravated murder is defined. Aggravated murder is premeditated murder. Premeditation is an element of aggravated murder. *In re the Personal Restraint Petition of Cross*, 178 Wn.2d 519,530, 309 P.3d 1186 (2013). The allegation that the murder was committed in the course or furtherance or flight from a rape is an alternative means of committing further degree murder that does not require the element of premeditation. RCW 9A.32.030(1)(c).

The government argued that the evidence supported the inference that CC was alive until petitioner's actions were heard by Karen Howard and she suggested that police might soon arrive at his door. RP 1651. Of course, Howard stated she heard *adults* running in petitioner's apartment, thus suggesting exculpatory evidence trial counsel failed to investigate.

1) Obviously the passage of time and the risk that Howard's memory could dim provided substantial incentive for the immediate interview of this essential witness. That, coupled with no expert testimony regarding when the injuries could have been sustained by CC investigated potentially exculpatory issues that trial counsel should have raised prior to giving petitioner any advice about pleading guilty.

2) The timing of the offer "only" four months into the case did not impair important aspects of the investigation. Consider that trial counsel could have and should have interviewed Howard; Saldavia – the individual who first contacted petitioner in the lobby of the apartment when he wanted to seek help from 911: Cathy Colley, Leah Jensen, and Laura Colley (if she would agree to an interview as she had counsel) regarding their plans for the evening of March 28, 2009, as their plans had changed at the last minute in an arguably bizarre consistent with their having involvement in CC's death; obtaining CPS records regarding allegations of Laura Colley's and Cathy Colley's prior physical abuse of CC; Cathy Colley, Leah Jensen, Laura Colley regarding fact that CC was up for adoption at the time of his death, thereby suggesting that Laura wanted to dispose of him; Ron Jones and Bobbye Jones, paternal grandparents who had knowledge of prior abuse of CC.

The Colleys, Jensen, and the Jones not only had important substantive evidence that pointed to other suspects, especially where trial counsel failed to consult their medical expert regarding the timing of the inflictions of the fatal injuries and where the county medical examiner had rendered no opinion, but also this testimony likely would have corroborated petitioner's testimony that he was gone from the residence for a period during the night as well as

Howard's testimony that she heard *adults running and arguing in the apartment during the relevant time.*

These interviews not only could have been conducted during the four months prior to the receipt of the offer but they also could have been conducted during the 13 days between August 13th and August 30th, the deadline for accepting the offer.

c) Inability to change plea to original information as a matter of right. Competent investigation likely would have caused trial counsel to conclude this was a triable and defendable case. Further, DPAS Williams expected trial counsel to seek a continuance in order to further investigate so they could properly advise petitioner. Williams testified that she had not foreclosed the possibility of re-opening the offer, depending on trial counsel might bring to them at a later date.

The essence of the State's argument here is that trial counsel was not ineffective because defendant was clearly guilty and no investigation needed to be done. This notion was been soundly rejected by the United States Supreme Court.

The fact that respondent is guilty does not mean he was not entitled by the Sixth Amendment to effective assistance or that he suffered no prejudice from his attorney's deficient performance during plea bargaining. *Lasher v. Cooper*, 566 U.S. 156; 132 S. Ct. 1376; 182 L. Ed. 2d 398, 411 (2012).

Respondent's citation to *Lasher* fails to cite the facts which compelled the court's conclusion and, of course, analysis of ineffectiveness is intensively fact specific. In that case, the respondent (defendant below) was charged under Michigan law with assault with intent to murder and three other offenses.

The prosecution offered to dismiss two of the charges and to recommend a 51-to-85-month sentence on the other two, in exchange for a guilty plea. In a communication with the court, respondent admitted his guilt and expressed a willingness to accept the offer. But he rejected the offer, allegedly after his attorney convinced him that the prosecution would be unable to establish intent to murder because the victim had been shot below the waist. At trial, respondent was convicted on all counts and received a mandatory minimum 185-to-360-month sentence.

In a subsequent hearing, the state trial court rejected respondent's claim that his attorney's advice was ineffective.

(c) Maybrown testified that petitioner certainly had viable challenges to the original aggravated murder charge via State v. Knapstad 107 Wa 2d 346, 729 2d 48 (1986).

Finding that the state appellate court had unreasonably applied the constitutional effective assistance standards laid out in *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674, and *Hill* v. *Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203, the District Court granted a conditional writ and ordered specific performance of the original plea offer. The Sixth Circuit affirmed. Applying *Strickland*, it found that counsel had provided deficient performance by advising respondent of an incorrect legal rule, and that respondent suffered prejudice because he lost the opportunity to take the more favorable sentence offered in the plea. *Lasher* is thus inapplicable to this case. As argued herein, had trial counsel investigated the State's evidence and witnesses in the case, trial counsel likely would have discovered the available exculpatory evidence, made a different recommendation to petitioner. Petitioner had always wanted to proceed to trial.

He had lost confidence in his attorneys' "do nothing" attitude. He rightly believed they were not interviewing necessary witnesses. Their failure to conduct an adequate investigation of his case and the State's evidence against him prejudiced him and cause him to enter a guilty plea. Had he not done so. Trial counsel's advice was constitutionally ineffective. Failure to investigate, coupled with other defects – here, ineffective advisement for plea - can constitute ineffectiveness. *In re Brett*, supra.

Likewise, counsel and/or their in-house investigator should have gone to the apartment building to canvass each unit to determine if other residents saw and/or heard anything.

They did not make any motion for a continuance of the proceedings after the State made its offer. Had they asked the State for a continuance so they could be better prepared to advise their client about the offer, the State likely would have agreed to one. RP 336. Obviously they could have asked for time to conduct their investigation as that would have made them better prepared to advise their client. The record bespeaks trial counsel who had no intention of doing anything for their client except resolving his case and moving on to the next one.

They did not listen to a recorded statement of Saldavia, Howard and Colley, thereby missing the chance to hear the speaker's inflection, tone, and

catch any possible error. They did not visit the scene. They did not seek any possible independent witnesses.

FOF 2. There was insufficient record to document the following acts as investigation which the trial court found had occurred based on trial counsel's "credible testimony":

a) [FOF 2.a] Reviewing and discussing charging documents with petitioner. The finding is that the attorneys "reviewed the charging documents and discussed with Petitioner before the plea." The attorneys' testimony on this is confused. There is no certainty as to when this happened, whether petitioner ever had a copy of the charging documents, or whether the charging documents and elements were ever discussed between April and the date the plea paperwork was prepared. Certainly trial counsel did not have the charging documents present at time of plea and was unable to explain to petitioner that he was pleading guilty to aggravating factors, the effect they could have on sentence and potentially disastrous consequences they could have on the State's "open recommendation – exceptional sentence."

b. [FOF 2.b] Filing a document attached to the notice of appearance is hardly investigation, especially when there is never any follow-up. It is a matter of having one legal assistant produce a form document.

c. [FOF 2.c] "Persistently followed up on the demand." As Warner explained, his practice is to put a "short bill of particulars" or as specific demand as you can "so that if the State fails to turn over some information you might have later grounds for appeal or challenge the outcome of the trial or conviction." RP 301. Clearly defense had little intention of acting on these requests – rather Warner views filing a bill of particulars as a way of making a record. Moreover, the document requested information that the prosecutor already was required to produce under CrR 4.7(a). RP 302.

d. [FOF 2.d] The defense attorneys called, wrote to and emailed the medical examiners office to find out when they would get the autopsy report. RP 477, 478. Whether contacting an agency to get discovery is "investigation" or clerical task is debatable. Defense counsel's reason for wanting the materials is unrelated to making the communications. Autopsy reports are a necessity in a homicide case [unless it is a bodiless homicide prosecution] and so all parties want the report as

quickly as possible. The autopsy report was provided on June 13, 2009. Ex. 71.

It was reasonable to want to obtain an expert review of the medical examiner report but not because of "petitioner's uncontroverted report of being alone with the victim when the injuries underlying the charges occurred." Careful review of petitioner's lengthy statement to police established gaps in the time and trial counsel never discussed his statement with him. Ex 26. Further, apartment resident Karen Howard [apartment below] heard *adults* running and arguing during the period when the government contends petitioner was alone with CC. Finally, the medical examiner did *not* any opinion or information regarding the timing of the infliction of CC's fatal injuries. Trial counsel would have competently investigated the case had trial counsel asked probative questions about CC's injuries such as window of time during which the injuries could have been inflicted instead of asking the Dr. Nelson whether the m.e.'s report was supported by the medical record. That was a useless inquiry, unhelpful to petitioner. Trial counsel agreed that this question would have been essential to the case had it proceeded to trial and affirmed that he would have asked it had the case gone to trial.

Of course, the answer would have been invaluable when advising petitioner regarding whether to go to trial or plead guilty.

e. [FOF 2.e] Reports of CC's pre-incident medical care were received in discovery from the State.

f. [FOF 2.f] Trial counsel admitted at the reference hearing that he failed to ask appropriate questions from Dr. Nelson. Nelson did not provide detailed opinions as he had no detailed facts about the offense. The facts about petitioner being alone with CC were simply incorrect and, if trial counsel believed they were correct, then trial counsel simply had at the least ignored independent witness Karen Howard. This statement had been provided in the initial discovery. For example, Warner did not know the outset time at which the fatal injuries could have been inflicted. When asked if that would have been a question obviously that would have been pertinent to defending the case, Warner answered, *"It would have been something if we were to go forward we would want to know more information from Dr. Nelson."* RP 511. Both the State and the trial counsel excuse trial counsel's failure to perform an adequate investigation because they believe that petitioner was guilty and/or less than candid with his counsel. The law does not permit this.

g. [FOF 2.g] Counsel did not review all or even most of the discovery with petitioner. Exhibit 71 shows when the jail visits occurred and when discovery came in. Counsel did not "share" the discovery with petitioner and encourage him to review it. Warner expected petitioner to ask to review discovery materials, apparently deciding that petitioner would be able to guess which discovery his attorney had. Although defendants may have redacted copies of discovery in their cells, defense counsel specifically advised against it and did not ever "share" any discovery with petitioner. Petitioner at no time had phone numbers for his attorneys and/or the ability to reach them telephonically. They could not call him in the Pierce County Jail.

h. [FOF 2.h] Counsel did obtain limited background information about petitioner from himself and his mother. Again, counsel spent very little time with petitioner and not much more with Janet Musga.

i. [FOF 2.i] Petitioner was in drug treatment on two occasions and he did not finish either program. These records were sparse. What counsel's intentions was in getting the records is irrelevant because counsel did nothing with them.

j. [FOF 2.j] Counsel, the legal assistant, or the in-house investigator located Ricky Saldavia's name on Laura Colley's Facebook friends list. This probably took a matter of minutes. They did nothing else with information. It is completely irrelevant that Janet Musga also had found the same information on Facebook as this Facebook account was open to the public. Trial counsel took no offense or umbrage from Janet Musga's efforts in this regard. Apparently the State viewed Janet Musga's concurrent discovery of public Facebook information as somehow damning to her credibility. The "credible" evidence showing otherwise came from the respondent's counsel.

k. [FOF 2.k] Petitioner's counsel did not know when they discussed the Herness statement with petitioner. On August 13, 14, 2009, Warner discussed this subject in an email string with their legal assistant, in-house investigator, and Hall. Ex. 57, 80. Snyder worked for the Newton firm. It must have occurred on August 29, 2009, when they presented petitioner with the plea offer as that was the first joint visit from the attorneys after becoming aware of the CI.

l. [FOF 2.l] Petitioner concedes that on August 13, 14, 2009, Warner asked Snyder to make a timeline. Warner directed him to read the discovery and made a timeline based on reading that material. Ex. 80.

Warner directed Snyder to perform this shortly before the plea and to expedite it. *Id.* It is unknown when it was completed. *Id.* Futher, there is no evidence or finding that this was ever used by trial counsel.

m. [FOF 2.m]There is no evidence that counsel ever met with petitioner in court-visiting areas before or after court appearances. *Passim.* Neither petitioner nor counsel testified that any such visiting occurred. Further, other than the fewer than 30 hours [which included time for travelling within the Pierce County Jail which requires proceeding through numerous locked sliding secured doors that are controlled remotely] on its face is not sufficient to review more than 850 pages of discovery. Trial counsel testified that they generally summarized some discovery but did not ask petitioner to comment on the police reports in any way, to suggest avenues of investigation. They repeatedly averred that they had no intention of conducting any interviews until all discovery was complete. They testified that they played petitioner's lengthy tape recorded statement to him.

That statement is approximately 2 hours, 35 minutes long. There is possibly one visit, May 16, 2016 that would have allowed that. Ex. 71. However, there would have been zero opportunity to stop the tape to discuss the details of the statement, ask questions about it, etc.

n. (FOF 2.n) Neither defense attorney nor their investigator interviewed a single witness prior to the plea, prior to sentencing, or at any time in this case, of course this is different. It prevented counsel from understanding the issues at the heart of this case. Asking critical questions of witnesses such as Dr. Nelson, evaluating the evidence in light of the charges, and providing meaningful advice to petitioner. There was not uncontroverted evidence placing petitioner alone with CC at the time the internal injuries causing his death were sustained. *There is not a scintilla of evidence in the 850+ pages of discovery that any physician or witness has ever provided a time period within which these injuries could have been sustained.* Further, Karen Howard, who resided in the apartment immediately below that which petitioner shared with Laura Colley and CC heard *adults running and arguing* during that the time that the State argued at the reference when the fatal injuries were inflicted.

Counsel Warner testified at the reference hearing that he should have asked Dr.Nelson questions about the window of time during the injuries could have been inflicted, especially knowing that it had not been determined by the Pierce County Medical Examiner and was likely broader. Warner testified that had the matter proceeded to trial,

he would have asked Dr. Nelson these questions. Warner also testified that had he been aware that Laura Colley, the biological mother, had CC up for adoption at the time of his death, and that there was a CPS history for her and her mother Cathy Colley for physical abuse of CC, he would have looked closely at them as possible suspects. All of this information should have been known and discussed with petitioner in the context of strength of the case. Further, waiting to commence interviews until they receive all discovery when experienced attorneys know that they received discovery even during trial, is not reasonable. Further, trial counsel should never expect to be restricted in case preparation by being denied access to witnesses – trial counsel surely was sufficiently experienced to know that they had access to the courts if they could not interview witnesses or re-interview witnesses as the need arose [depositions are not allowed in criminal cases, except in extraordinary circumstances, CrR 4.6]. Trial counsel's excuses for failing to conduct any investigation whatsoever for more than four months lacked any rational strategy or tactical basis. Civilian witnesses from the apartment building needed to interviewed while their memories were fresh, Karen Howard was especially important as she had knowledge of numerous individuals in the residence at the

time the government contended CC sustained his fatal injuries. Trial counsel's failure to immediately interview her likely resulted in the loss of evidence of other witnesses, information about how many adults she heard in the apartment whether she heard female or male voices, how long she heard multiple people there, etc. This is significant evidence that directly counters the State's repeated assertion that there is "uncontroverted evidence" that petitioner was alone with CC when the injuries which lead to his death were sustained. Assuming that anyone has determined the time with reasonable medical certainty, the State is referring to that post-midnight period. And trial counsel ignored the evidence.

Findings on alleged prejudice.

1. [FOF 1] Petitioner disputes the court's finding that he failed to prove by a preponderance of the evidence that he was prejudiced by counsel's deficient representation.

2. [FOF 2, 3] The standard for proof of prejudice of ineffective assistance of counsel resulting from deficient investigation is set forth above. In short, petitioner must establish *by a reasonable probability,* that he would not have pled guilty and would have insisted on going to trial. ++

3. [FOF 3] In this case, petitioner established that probability. Petitioner always wanted it to go to trial. His attorneys knew that and they planned to go to trial-evidently. Petitioner believed there were individuals who should be interviewed and he gave these names to counsel Warner. He became increasingly depressed when Warner informed him they were waiting to do interviews until all discovery was in. Petitioner's mother Janet Musga also corroborated his testimony. Petitioner's statements at the plea and sentencing hearing are customary. Defendant's customarily do not assist their counsel at such hearings and they generally speak to court for mercy. He established that an interview of Karen Howard would have provided exculpatory evidence.

He established that there was evidence that CC had sustained injuries prior his being alone with CC and that he had sent photos of these injuries to his mother earlier that evening. His mother and others had previously seen injuries on CC prior to March 28-29, 2009. Respondent elicited testimony from Det. Nist that the reports of these injuries "informed" trial counsels' investigation but that they deferred interviewing witnesses until they had received all discovery. They made the same decision regarding the outer time limits on CC' injuries. By failing to interview promptly the Colleys and Jensen, they did not know that CC was up for adoption. Warner testified that all of this information would have been important for trial. Petitioner submits

that all of this potential exculpatory evidence would have affected his decision to enter a guilty plea and would caused him to go to trial. Petitioner was required by the State to enter a factual plea.

4. [FOF 4] The DNA evidence was potentially exculpatory because it did not in anyway link petitioner to the injuries on CC. The State argued that the bloody diapers had been made by petitioner in his care of CC. There was no evidence of that. There were no epithethial cells [sloughed cells from petitioner's hands or hair] on the diapers.

There was no physical evidence to connect him to this evidence which was extremely prejudicial and which the State inflammatorily referred to as damning evidence of petitioner's guilt. The report did not strengthen the State's case. At worst, it benefited neither side.

4. [FOF 4 –A] Petitioner's claim of prejudice is not based on hypotheticals. It is grounded in the record. The DNA report does not contain the conclusions the State attributes to it. Likewise, the State has significantly and misrepresented the importance and effect of other reports and evidence on defense counsel's deficient investigation. Significantly, respondent asked trial counsel repeatedly asked trial counsel and witnesses whether various documents "informed" their

investigations. The taped and handwritten statements of witnesses contain affirmations of their truthfulness.

Respondent did not object to any of the testimony below as inadmissible hearsay, except for statements of Bobbye and Ron Jones with petitioner sought to admit through Nancy Austring. Neither did respondent ask for a limiting instruction. In the absence of a limiting instruction, the court may consider the evidence for any purpose.

6. [FOF.5] Petitioner agrees that the Muscatel's opinion report did not affect his decision to plead guilty. It was done after he pled guilty. *Petitioner has never contended that it was relevant to his decision to plead guilty.*

7. [FOF.6] Petitioner's claim that petitioner presented "newly discovered covered" evidence at the reference hearing Laura Colley and her family's abuse and lack of devotion to CC. would have changed his decision to plead guilty. Petitioner made this claim regarding the deficient investigation and something that was in the police reports that trial counsel should have investigated. Ex., Trial counsel should have confronted about the statements Jamie Wilson, Ron Jones, Bobbye Jones, all of whom had seen bruises on CC for which Laura Colley had unreasonable explanations. Petitioner hardly would be the first boyfriend to cover his girlfriend, especially when she was

the "love of his life." Both Leah Jensen, Laura's sister, and Branon Jones, father of CC, believed that Laura was fully capable of committing the crimes. There is no evidence that the injuries to CC requires the perpetrator to have used an excessive or extreme amount of force.

8. [FOF 7] This is sustained in other findings.

9. [FOF 8] Trial counsel did fail to reseach the law regarding the State's ability to amend to aggravated premeditated murder. Trial counsel has a duty to discuss with his client the facts of the case in the context of the charges, including proposed amendments. If the proposed amendments are unlikely to be provable at trial, trial counsel has a duty to inform his client. Warner concurred with Maybrown that the State would have a very difficult time proving the element of premeditation. Had petitioner known this, there is a reasonable probability that he would not have entered a guilty plea.

B. FACTUAL FINDINGS OF QUESTION 2: DID PETITIONER'S TRIAL COUNSEL ADEQUATELY ADVISE REGARDING PLEADING GUILTY TO FIRST DEGEREE MURDER.

Again, the trial court's FOF are not supported by substantial evidence. Neither trial counsel had clear recollection of going through the plea paperwork with petitioner.

1. [FOF 1] Neither trial counsel recalled whether they both were when they discussed the plea paperwork with petitioner, whether petitioner actually had a copy of the document to read along, Warner was certain that he did not ask petitioner if he understood the document as he read it to petitioner as he expected the 19 year old former heroin addict and high school drop-out to ask informed questions as counsel read these important documents. Warner was not sure of the date that he went over the plea paper work with petitioner. However, there are only two possible dates. On August 29, 2013, Warner and Hall were with petitioner for less than one hour. Ex. 71. On September 6, 2013, both counsel again were with him for about one hour. Ex. 71. That is insufficient time to review two lengthy plea documents.

2. [FOF 2] Trial counsel made representations to the court at the plea hearing. The trial court asked minimal questions to petitioner.

Petitioner's subsequent interactions with the presentence report writer and the psychologist are not relevant to his decision to plead guilty, which was over and done by then. There was no credible testimony that trial counsel advised petitioner of the aggravating factors as trial counsel did not even have a copy of the charging document or statute with him at the time of review of the plea paperwork. Trial counsel testified that he did not know that the State was seeking an upwards exceptional sentence and so he would have had no reason

to discuss the significance of pleading to the aggravating factors, which he did not do at the trial and did not testify that he his discussed the strength of the State's evidence and he could not do so because he had done no investigation. This is ineffective per so. Trial counsel did not discuss Dr. Nelson's findings, which he admitted were adequate for trial anyway. Trial counsel simply could not have discussed all of these matters plus the plea form in less than one hour.

3. [FOF.3] Trial counsel testified that he did not ask questions when he went over the plea paperwork with petitioner and that petitioner did not ask him questions. He concluded that petitioner understood the plea paperwork. Petitioner affirmatively answered the trial court when the trial court asked him if he understood the plea form. This is standard in pleas.

4. [FOF.4] is not supported by sufficient evidence for even Warner himself testified that he could have met with petitioner to inform his of the offer after his meeting with the prosecutors on the afternoon of August 29, 2009. This was the day before the petitioner had to accept the offer. Petitioner's claim is substantiated by his counsel's own testimony. Despite Warner emails expressing a desire to meet with petitioner on an earlier date, Warner did not recall doing so. Plans and actions often differ markedly. The trial court had to

disregard the testimony of a witness it had previously determined to be credible to make this finding.

5. [FOF.6] is not supported by substantial evidence. The August 29, 2009 meeting was the only meeting to discuss the offer. This meeting occurred immediately before their meeting with petitioner. They did not ask to continue the case. They did not seek a better offer.

6. [FOF.5] is not supported by substantial evidence. There is no evidence that either trial counsel told petitioner that the State would not seek the death penalty if they charged him with aggravated murder.

That Mr. Warner told petitioner's mother that he did not think the death penalty was likely or was a remote possibility still did not remove it as a possibility. Such statements are hardly comforting to one whose child nevertheless may still die at the government's hands. The possibility weighted heavily on petitioner. The potential for a death penalty sentence was the significant motivating factor for petitioner's plea.

7. [FOF.8] Warner did not ever explain to petitioner that death was no longer an option, that the State likely would seek an upwards exceptional sentence of decades, which to a 19 year old is a virtual like sentence, that he had the right to notice of the specific aggravating factors upon which the State would rely for an exceptional sentence, the right to a jury trial pursuant **to** _____.

Warner's testimony is not credible given his one hour explanation of the offer and his one hour explanation of the plea paperwork.

Findings on alleged prejudice.

1. [FOF.1] As noted above, petitioner has satisfied his burden. But for trial counsel's representation was deficient with regard to his guilty pleas and sentencing by failing to conduct an adequate investigation into his case and the State's evidence against him, failing to adequately advise him regarding pleading to first degree murder, and failing to inform him of the consequences of his guilty plea statement on the court's ability to impose an exceptional sentence; and if counsel's representation was deficient, did that deficient representation prejudice petitioner's decision to plead guilty and or his sentencing.

2. [FOF.2] This sets forth the legal standard. For the reasons set forth herein, petitioner easily satisfied the standard.

3. [FOF.3] Petitioner was 19 years old throughout the period from arraignment to sentencing. He had been a heroin addict for several years and had not graduated from high school. Petitioner presented testimony of his counsel from arraignment. Whether petitioner left the courtroom with a copy of the charging documents would not be reflected in any transcript from the arraignment. Petitioner obviously had an arraignment on April 2, 2009.

4. [FOF.4] This FOF is a non sequitur. There is no logical reason the petitioner would spontaneously discuss his confusion about his plea with the psychologist, the presentence report writer, or his counsel whom he rarely saw and had no ability to initiate contact with.

5. [FOF.5] Statements at sentencing when petitioner expressed remorse that CC died while he was babysitting are not confessions of guilt.

6. [FOF.6]. The court's disbelief that trial counsel waited to discuss the State's plea offer with petitioner until august 29, 2009, is understandable. Unfortunately, attorney Warner, the attorney who actually remembered the date, specifically recalled that it was August 29, 2009, right after their meeting with the prosecutors. The court's disbelief belies the unreasonableness of giving petitioner less than twenty-four hours to decide whether or not to accept this hour.

7. [FOF.7] This finding of fact is not a claim made by petitioner. Of course every criminal defendant would like a better offer. However that is not the issue in this case and has never has been.

One hour is not sufficient to go through complicated guilty plea statements, both of which require the petitioner to plead guilty to aggravating factors, include a multiple page sex offense plea form involving a sentence subject to the Indeterminate Sentencing Review Board as well as a plea

statement to a non-sex felony and where the potential effect of the aggravating factors is not set forth in either plea statements. Further, where trial counsel did not have a copy of the charging document and the Sentencing Reform Act at time of review of the plea forms, trial counsel would have been in a difficult position explaining the elements of the offenses, the standard ranges, and the other components of the sentences for the crimes to which petitioner was pleading. Because trial counsel did not ask petitioner whether he understood what was being said but rather assumed from the 19 year old's failure to ask interrupt and ask questions that he did, trial counsel hastily read through the only copy of the plea forms in the room.

8. [FOF 4]. Petitioner's testimony that he did not know at time of plea the State would seek an exceptional sentence upwards is credible. Warner testified to the same fact. Petitioner had been advised that the State needed to follow the procedures. He had never been advised that pleading to the aggravators would enable the State to impose an exceptional upwards and he would not have entered a plea under that condition. Trial counsel did not understand that the plea would have that effect.

Findings on alleged prejudice.

1. [FOF 1, 2] Petitioner had met his burden pursuant to the standard of review set forth above.

2. [FOF 3] **See "__",** ***supra.*** **Petitioner** suffered actual prejudice from misadvisement.

3. [FOF4] Trial counsel's statements at the plea hearing were contrary to his previous advisement to counsel, contrary to his understanding of the law as testified to at the reference hearing, and raise questions as to his candor to the court at the plea hearing.

4. [FOF 5] Petitioner suffered substantial and actual prejudice that establishes a reasonable probability that he would not have entered guilty pleas in this case. He is entitled to the relief requested.

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With fewer than 24 hours within which to accept the offer to plead as charged or face the draconian charge of an aggravated murder with a possible death sentence, the 19 year old petitioner "choose" to plead guilty. It was the lesser of two evils.

Petitioner did not get justice. But he did not get an aggravated murder charge.

He is entitled to relief in this court.

DATED this 10th TH day of February, 2017

/s/ Barbara Corey

Barbara Corey, WSB #11778

I declare under penalty of perjury under the laws of the State of Washington that the following is a true and correct: That on this date, I delivered via ABC- Legal Messenger a copy of this Document to: Appellate Division Pierce County Prosecutor's Office, 930 Tacoma Ave So. Room 946 Tacoma, Washington 98402 and via USPS to Jake Musga 1313 N. 13th St. Walla Walla WA.

2/10/17

/s/ William Dummitt
Legal Assistant
William@bcoreylaw.com

C. CONCLUSION

Petitioner respectfully asks the court to grant this personal restraint petition. He has met his burden to establish that trial counsel failed to provide effective representation by failing to conduct an adequate investigation and that this deficient representation prevented them from providing appropriate advice regarding the State's "plea offer." Because of this ineffective assistance, petitioner entered a guilty plea whereas had he received effective assistance there is aa reasonable probability that he would not have done so. Trial counsel could not advise him regarding the strengths and weaknesses of the State's case, how the evidence fit into the elements of the crime. Trial counsel failed to advise him that pleading guilty to aggravating factors was enabling the State to obtain an exceptional sentence. Petitioner always wanted to go to trial. He had implored counsel to investigate this case from the beginning and finally concluded that they were never going to do so.

Trial counsel agrees that they conveyed the State's offer to him to plead guilty as charged on August 29, 2009, the date before the expiration date of August 30, 2009. Trial counsel had the offer since August 13, 2009.

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

In Re the Personal Restraint Petition of JAKE JOSEPH MUSGA, Petitioner.	No. 46987-1-INFORMATION ORDER REMANDING PETITION TO SUPERIOR COURT FOR REFERENCE HEARING

Petitioner Jake Musga seeks relief from personal restraint imposed following his guilty pleas for first degree murder and first degree child rape. Musga claims that he would not have entered his guilty pleas but for his defense counsels' alleged ineffective assistance of counsel.

Musga's petition presents sufficient evidence to make a prima facie showing of constitutional error, but raises factual issues that cannot be determined based on the limited record before us. Therefore, we remand this petition to Pierce County Superior Court for a reference hearing to address Musga's ineffective assistance of counsel claim.

FACTS

On April 3, 2013, the State filed criminal charges against Musga: count I was for first degree felony murder and count II was for first degree child rape. Investigation revealed evidence indicating that Musga beat to death and anally raped CC, a two-year-old boy. CC was the son of Laura Colley, Musga's girlfriend. Musga's parents retained attorneys Keith Hall and Richard Warner to represent Musga for all services reasonably necessary to defend Musga.

On September 9, 2013, Musga pleaded guilty to both charges. In his guilty plea statement for first degree murder Musga stated in answer to question 11 what made him guilty of the crime. Musga admitted that he picked up CC and slammed him onto the floor after the child

urinated on him and that he put his finger into CC's rectum when the child would not stop crying. Musga also admitted that "C.C. was particularly vulnerable because he was only two years old and was incapable of resisting and my conduct was deliberately cruel. . . . Furthermore, the injuries suffered by C.C. substantially exceeded the level of bodily harm necessary to satisfy the elements of this offense as C.C. had numerous injuries to his head, abdomen, rectum and severe bruising all over his body." PRP Appendix B at 9.

In his guilty plea statement for first degree child rape Musga also stated in answer to question 11 what made him guilty of that crime. Musga admitted that he engaged in sexual intercourse with CC. Musga also admitted that "I put my finger in his rectum which was deliberately cruel because he couldn't resist because of his age." PRP Appendix C at 8.

The guilty plea statements for both charges also acknowledged that the trial court had the authority to impose an exceptional sentence under certain circumstances.

At sentencing, the trial court noted that Musga had stipulated that there were aggravating circumstances justifying a departure from the standard range sentence. The trial court sentenced Musga to exceptional sentences of 608 months for count I and 258 months to life for count II. Musga did not file a direct appeal.

ANALYSIS

A personal restraint petitioner may be entitled to collateral relief if he or she establishes that he or she was actually and substantially prejudiced by a constitutional error. *In re Pers. Restraint of Finstad*, 177 Wn.2d 501, 506, 301 P.3d 450 (2013). Ineffective assistance of counsel is a constitutional error, arising from the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. *State v. Grier*, 171 Wn.2d

17, 32, 246 P.3d 1260 (2011). To prevail on an ineffective assistance of counsel claim, the defendant must show both that (1) defense counsel's representation was deficient and (2) the deficient representation prejudiced the defendant. *Id.* at 32-33

Because we do not weigh evidence or find facts, we may order a reference hearing when the petitioner makes a prima facie showing of constitutional error but the merits of the claim cannot be determined solely on the record. *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 18, 296 P.3d 872 (2013).

Here, Musga claims that he was actually and substantially prejudiced because his two defense attorneys provided ineffective assistance of counsel by failing to (1) conduct an adequate investigation into his case and the State's evidence against him, (2) adequately advise him regarding pleading guilty to first degree murder, and (3) inform him regarding the consequences of his guilty plea and facts admitted in his guilty plea statement on the trial court's ability to impose an exceptional sentence.[1] Musga claims that he would not have pleaded guilty to the crimes if defense counsel had provided effective assistance.

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[1] Musga also claims that defense provided ineffective assistance by failing to provide various discovery documents to him. We have determined that Musga has not presented a prima facie case of prejudice resulting from this alleged deficient representation. Therefore, the trial court need not address it.

In addition, Musga argues in one sentence that defense counsels' performance was deficient because they failed to prepare Musga for the mandatory presentence interview, required Musga to undergo a psychological examination without notice or explanation, shared the unfavorable results of the psychological examination with the sentencing court, and failed to provide Musga with an opportunity to read the presentence report prior to sentencing. To the extent Musga raises these arguments, he fails to demonstrate a prima facie case of prejudice resulting from this alleged deficient representation. Therefore, the trial court also need not address these contentions.

We hold that Musga has presented sufficient evidence to make a prima facie showing of constitutional error, but that the record before this court is insufficiently developed to resolve his claims. Therefore, we remand to the superior court for a reference hearing to enter all findings of fact necessary to address the following issues:

1. Whether defense counsel's representation was deficient in one or more of the ways Musga alleges with regard to his guilty pleas and/or his sentencing; and

2. If defense counsel's representation was deficient, whether the deficient representation prejudiced Musga with regard to his decision to plead guilty and/or his sentencing.

Accordingly, it is

ORDERED that this personal restraint petition is remanded to the superior court to hold a reference hearing and enter findings of fact within 75 days after the date of this order. The parties shall supplement the record with the superior court's findings of fact and a verbatim transcript of the reference hearing within 30 days after the trial court enters findings of fact. The appellant shall file a supplemental brief within 15 days after this court has received the full reference hearing record and the respondent shall file a supplemental brief within 15 days after receiving the appellant's brief.

DATED this 10th day of February, 2016.

PANEL: J.j. Maxa, Melnick, Sutton

FOR THE COURT:

Maxa, J.

Presiding Judge

APPENDIX B

Schedule of Attorney Visits/Court and Discovery Dates

No.	Date	Attorney (s)	Time In	Time Out	Court Date	Discovery Date
1	04/01/13				4/1/13 (continued)	
2	04/02/13	Keith Hall	11:00	12:24		
3	04/03/13				04/03/13	
4	04/05/13	K. Hall / R. Warner	10:00	12:14		
5	04/18/13	K. Hall / R. Warner	10:45	12:21		
6	04/23/13				04/23/13 (twice)	
7	04/23/13					04/24/13
8	05/06/13	K. Hall / R. Warner	10:05	11:21		
9	05/07/13					05/07/13
10	05/08/13				5/8/13 (continued)	
11	05/15/13					05/15/13
12	05/16/13	Richard Warner	08:11	11:11		
13	05/22/13	K. Hall / R. Warner	14:12	14:50		
14	05/29/13				5/29/13 (continued)	
15	05/31/13					05/31/13
16	06/10/13	Richard Warner	10:30	12:22		
17	06/13/13					06/13/13
18	06/26/13					06/26/13
19	07/01/13	Richard Warner	12:00	13:26		
20	07/11/13	Richard Warner	09:49	11:34		
21	07/18/13	Richard Warner	11:00	11:56		
22	08/08/13	Richard Warner	14:40	15:54		
23	08/13/13				8/13/13 (continued)	
24	08/13/13					08/13/13
25	08/19/13	Richard Warner	10:00	11:03		
26	08/22/13	Richard Warner	10:31	11:46		
27	08/26/13	Richard Warner	11:00	12:52		
28	08/27/13					08/27/13
29	08/29/13	K. Hall / R. Warner	13:23	14:17		
30	08/29/13					08/29/13

Schedule of Attorney Visits/Court and Discovery Dates

31	09/06/13	K. Hall / R. Warner	10:58	12:05		
32	09/09/13				09/09/13 (cancelled)	
33	09/09/13				09/09/13 (cancelled)	
34	09/09/13				09/09/13	
35	09/12/13	Richard Warner	12:38	13:04		
36	09/17/13				9/17/13 (continued)	
37	09/20/13	Richard Warner	09:45	10:19		
38	10/11/13	Richard Warner	09:38	10:41		
39	11/04/13					11/04/13
40	11/08/13	Keith Hall	12:52	15:08		
41	11/18/13	Richard Warner	08:20	09:29		
42	11/18/13				11/18/13 (cancelled)	
43	11/21/13				11/21/13 (cancelled)	
44	11/21/13				11/21/13	
45	12/05/13				12/05/13	

APPENDIX C

Schedule of Attorney Visits/Court and Discovery Dates

No.	Date	Attorney (s)	Time In	Time Out	Court Date	Discovery Date
1	04/01/13				4/1/13 (continued)	
2	04/02/13	Keith Hall	11:00	12:24		
3	04/03/13				04/03/13	
4	04/05/13	K. Hall / R. Warner	10:00	12:14		
5	04/18/13	K. Hall / R. Warner	10:45	12:21		
6	04/23/13				04/23/13 (twice)	
7	04/23/13					04/24/13
8	05/06/13	K. Hall / R. Warner	10:05	11:21		
9	05/07/13					05/07/13
10	05/08/13				5/8/13 (continued)	
11	05/15/13					05/15/13
12	05/16/13	Richard Warner	08:11	11:11		
13	05/22/13	K. Hall / R. Warner	14:12	14:50		
14	05/29/13				5/29/13 (continued)	
15	05/31/13					05/31/13
16	06/10/13	Richard Warner	10:30	12:22		
17	06/13/13					06/13/13
18	06/26/13					06/26/13
19	07/01/13	Richard Warner	12:00	13:26		
20	07/11/13	Richard Warner	09:49	11:34		
21	07/18/13	Richard Warner	11:00	11:56		
22	08/08/13	Richard Warner	14:40	15:54		
23	08/13/13				8/13/13 (continued)	
24	08/13/13					08/13/13
25	08/19/13	Richard Warner	10:00	11:03		
26	08/22/13	Richard Warner	10:31	11:46		
27	08/26/13	Richard Warner	11:00	12:52		
28	08/27/13					08/27/13
29	08/29/13	K. Hall / R. Warner	13:23	14:17		
30	08/29/13					08/29/13

Schedule of Attorney Visits/Court and Discovery Dates

31	09/06/13	K. Hall / R. Warner	10:58	12:05		
32	09/09/13				09/09/13 (cancelled)	
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40	11/08/13	Keith Hall	12:52	15:08		
41	11/18/13	Richard Warner	08:20	09:29		
42	11/18/13				11/18/13 (cancelled)	
43	11/21/13				11/21/13 (cancelled)	
44	11/21/13				11/21/13	
45	12/05/13				12/05/13	